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IN THE SUPREME COURT OF THE UNITED STATES

No: 79-5688

TRACY LEE HUDSON, PETITIONER,

vs.

STATE OF LOUISIANA, RESPONDENT.

MOTION FOR LEAVE TO PROCEED WITH PETITION
FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

Comes now the petitioner, Tracy Lee Hudson, by and through his attorney of record, Richard Otto Burst, Sr., and moves this Court for permission to proceed with Petition for Writ of Certiorari in the Supreme Court of the United States from the judgment of the Supreme Court of the State of Louisiana affirming the judgment of the District Court denying petitioner the relief sought therein on his habeas corpus application.

In support of this motion, attached hereto is a properly notarized Affidavit of Poverty in compliance with 28 U.S.C., Sec. 1915.

TRACY LEE HUDSON, PETITIONER

By: _____
Richard Otto Burst, Sr., Attorney
for Petitioner
Burst & Dewart, Attorneys, Inc.
209 E. Oklahoma, P.O. Box 578
Guthrie, Oklahoma 73044

AFFIDAVIT OF POVERTY

STATE OF LOUISIANA )
) SS:
PARISH OF WEST FELICIANA )

I, Tracy Lee Hudson, being first duly sworn, depose and say that I am the petitioner in the above entitled case and I am a citizen of the United States; that in support of my motion to proceed with petition for writ of certiorari in the Supreme Court of the United States from the

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STATE OF LOUISIANA )
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PARISH OF WEST FELICIANA )

I, Tracy Lee Hudson, being first duly sworn, depose and say that I am the petitioner in the above entitled case and I am a citizen of the United States; that in support of my motion to proceed with petition for writ of certiorari in the Supreme Court of the United States from the judgment of the Supreme Court of the State of Louisiana without being required to prepay fees, costs, give security thereof, I state that because of my poverty that I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to redress, and that the issue which I desire to present on appeal is as follows:

Whether or not the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's guilty verdict has been set aside and a new trial ordered by the trial judge on a motion for new trial, for the reason as stated by the trial judge as follows, to-wit:

> "In the present case, I heard the same evidence the jury did, I am convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of homicide committed by the defendant of this particular victim." (Transcript of Motion for New Trial, page 12, lines 20 through 25.)

That I believe that I am entitled to redress for the further reason that the sub-issue which I desire to present on appeal is as follows:

Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution applies to the State of Louisiana only if there is a finding of no evidence by the trial judge or if the double jeopardy clause of the Fifth Amendment applies to the State of Louisiana if there is a finding of insufficient evidence.

Further, I am presently in custody at the State Penitentiary, Angola, Louisiana, under the judgment and sentence issued by the District Court of Bossier Parish, Louisiana; that I have been in continuous custody since December of 1976 when I was first arrested on this charge, having been incarcerated at the Parish Jail, Bossier Parish, Louisiana, until after denial of my writ of habeas corpus in November of 1978.

I have during the past two and one-half years of incarceration received no income. I do not have any business, profession or other source of income at the present time. I do not own any cash other than a small amount provided me by my parents periodically for spending; I do not have a checking or savings account nor do I own any stocks, bonds or other valuable property. I do not now own an automobile. I do not own or have any interest in any real property. The automobile I did own when charged with this offense was sold to provide fees for payment of my attorneys through the first trial on the merits, which was reversed by the trial court upon motion for new trial, for the reasons stated; I was provided court-appointed counsel subsequent to the motion for new trial.

I further believe in good faith, that I am entitled to the relief I am seeking, understanding that a false statement to the answer of any of the questions in this Affidavit will subject me to penalties for perjury and further swear that the responses which I have made in this Affidavit relating to my ability to pay the costs of prosecuting the petition for writ of certiorari are true and correct. I therefore request leave to prosecute the proposed petition for writ of certiorari in forma pauperis.

Tracy Lee Hudson

Tracy Lee Hudson

Tracy Lee Hudson, being first duly sworn on his oath presents that he has subscribed to the above and does state that the information contained therein is true and correct to the best of his knowledge and belief.

Tracy Lee Hudson

Tracy Lee Hudson

Subscribed and sworn to before me this 26 day of July, 1979.

Notary Public

My commisson expires:

N/A

(Date commission expires)

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OCTOBER TERM, 1979

NO. 79-5688

TRACY LEE HUDSON, Petitioner,

VERSUS

THE STATE OF LOUISIANA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW

A JUDGMENT OF THE SUPREME COURT OF LOUISIANA

RICHARD OTTO BURST, SR. of
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NOVEMBER, 1979

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# APPENDIX


Appendix A - Opinion of the Supreme Court of Louisiana (June 25, 1979) . . . . . A-1

Appendix B - Dissenting Opinion of the Supreme Court of Louisiana (June 27, 1979) . . . . . B-1

Appendix C - Denial of Application for Rehearing (September 4, 1979) . . . . . C-1


# AUTHORITIES

## Cases Cited


Burks v. United States, ____ U.S. ____, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) . . . . . 4, 5, 6, 7

In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, ____ L.Ed.2d ____ (1970) . . . . . 5, 7

Jackson v. Virginia, ____ U.S. ____, 99 S.Ct. 2781, ____ L.Ed.2d (1979) . . . . . 5, 6, 7

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Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (19__) . . . . . 6


## Statutes Cited


28 U.S.C., Section 1254 (1) . . . . . 2

LSA-C. Cr. P. art. 851 . . . . . 2

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THE STATE OF LOUISIANA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW
A JUDGMENT OF THE SUPREME COURT OF LOUISIANA

---

Comes now the petitioner and respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of Louisiana issued on June 25, 1979, rehearing denied on September 4, 1979, in the State of Louisiana versus Tracy Lee Hudson, Case No. 63,450.

## OPINIONS BELOW

The opinion of the Supreme Court of Louisiana was rendered on the 25th day of June, 1979 (Appendix A); a dissenting opinion was filed on June 27, 1979 (Appendix B). An Application For Rehearing was timely filed; the Court denied the Application For Rehearing on September 4, 1979, in a four to three decision (Appendix C).

The opinion of the Supreme Court of Louisiana affirmed the ruling of the Honorable Cecil C. Lowe, Judge, of the Twenty-Sixth Judicial District Court, Parish of Bossier, Louisiana, in the case filed State of Louisiana vs. Tracy Lee Hudson, numbered 54,929. Judge Lowe, therein,

denied petitioner's writ of habeas corpus, timely filed, under Louisiana law, wherein petitioner had alleged that the "sustaining of motion for new trial on insufficiency of evidence is bar to further prosecution for the same offense under the Fifth Amendment double jeopardy clause".

## JURISDICTION

The opinion filed on June 25, 1979, which became final upon denial of rehearing on September 4, 1979, is now presented for review. The Petition for Certiorari was filed within ninety (90) days of the date the Supreme Court of Louisiana denied the Application For Rehearing. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1) and Rule 22 (2) of the Rules of the Supreme Court of the United States.

## QUESTION PRESENTED

1. Whether or not the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's guilty verdict has been set aside and a new trial ordered solely for lack of sufficient evidence to sustain the jury's verdict.

2. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution applies to the State of Louisiana only if there is a finding of no evidence by the trial judge or if the double jeopardy clause of the Fifth Amendment applies to the State of Louisiana if there is a finding of insufficient evidence.

## STATUTORY PROVISIONS CITED

LSA-C. Cr. P. art. 851 provides:

> "The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> "'The Court, on motion of the defendant, shall grant a new trial whenever:

"'(1) The verdict is contrary to the law and the evidence, or

"'(2) The Court is of the opinion that the ends of justice would be better served by the granting of a new trial although the defendant may not be entitled to a new trial as a matter of strict legal right."

## STATEMENT

On January 4, 1977, Tracy Lee Hudson, hereinafter referred to as "petitioner", was charged with first degree murder in the District Court in and for the Twenty-Sixth Judicial District, Parish of Bossier, Louisiana, Criminal Docket No. 54,924; on March 2, 1977, petitioner was found guilty by a jury; on March 7, 1977, the Honorable Enos C. McClendon sustained a motion for new trial on the sole ground that the evidence presented by the State was insufficient to sustain the verdict of guilty.

Judge McClendon reasoned:

"In the present case, I heard the same evidence the jury did, I am convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of homicide committed by the defendant of this particular victim." (First Footnote to Louisiana Supreme Court opinion, [appendix A attached hereto], and motion for new trial transcript, page 12, lines 20 through 25.)

The Supreme Court of Louisiana upheld that decision. State v. Hudson, 344 So.2d. 1 (1977)

Petitioner was retried and found guilty on September 30, 1977. At the re-trial the State, for the first time, introduced an eye witness who stated he had viewed petitioner stabbing the victim; on cross-examination the supposed eye witness testified that he told the police at the death scene that he had observed the whole thing, but his name got lost somewhere, (Second trial transcript, page 215, lines 8 through 13.) until about a month before the second trial. (Second trial transcript, page 213, lines 21 through 27.)

It should be noted that the supposed eye witness was at a location removed from the stabbing incident until two young girls (also State witnesses) went to ". . . call the police and send an ambulance. . . "

(Second trial transcript, page 171, lines 16 through 18), or " . . . call the cops. . . ." (Second trial transcript, page 176, line 15); the prior statement being a voluntary response to cross-examination; the latter being a response to re-direct examination. The testimony of the two girls is confusing but it is important in that if the sequence of events is that the girls went to call an ambulance to assist the stabbing victim, that the supposed eye witness would not have been in a location to see the victim stabbed until after the stabbing occurred; this is so because the young girls advised the supposed eye witness of the incident when they went to call the police and send an ambulance, or call the cops. The girls had not viewed a stabbing, but had happened back on the scene and observed the victim lying in the trailer adjacent to the driveway where an argument had been witnessed by them between the victim and the defendant.

The immediately foregoing sequence of event is not directly in point on the issue herein presented, but is set forth to underscore the type and nature of testimony that develops to support a second trial when the first is overturned for insufficient evidence; that is, in the opinion of the writer, testimony of dubious trustworthiness and credibility based upon conflict between the eye witness testimony and the testimony of the other State witnesses, and on the extremely doubtful and unlikely occurrence of an eye witness advising the police at a murder scene that he had witnessed the whole thing in a community where murder is not that frequent and the police losing his name until a second trial nine months later.

It should be noted that the defendant denies, denied in the first trial and denied in the second trial, and has at all times denied that he committed the stabbing.

On June 19, 1978, the Supreme Court of Louisiana issued Opinion No. 61385 affirming the second conviction; on August 31, 1978, a re-hearing was refused.

On June 14, 1978, Burks v. United States, 98 S.Ct. 2141, was issued by this Court holding that as a matter of substantive constitutional law, the double jeopardy clause of the Fifth Amendment prohibits the retrial of a defendant when his original trial was overturned for insufficient evidence.

On October 2, 1978, based on Burks, supra, a Writ of Habeas Corpus was filed on behalf of petitioner; under Louisiana law, such issue of former jeopardy was timely raised by such Writ; the timeliness was not an issue below and therefore is not an issue herein. On November 13, 1978, the Writ was denied by the Honorable Cecil C. Lowe, Judge, Twenty-Sixth Judicial District, Bossier Parish, Louisiana.

Writ of Certiorari was accepted by the Supreme Court of Louisiana, oral argument held, and the Writ was denied by order entered June 25, 1979 with one justice dissenting; rehearing was denied by order filed September 4, 1979, with three of seven justices stating they would grant a rehearing.

From such denial of rehearing, petitioner has timely requested this Court to accept Writ of Certiorari to the Supreme Court of the State of Louisiana.

## REASONS FOR GRANTING THE WRIT

In In Re Winship, 397 U.S. 358, 90 S. Ct. 1068, _____ L.Ed.2d _____ (1970), this Court stated:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". (1073)

In Jackson v. Virginia, _____ U.S. _____, 99 S. Ct. 2781, _____ L.Ed.2d (1979), this Court stated:

> "This is the first of our cases to expressly consider the question whether the due process standard recognized in Winship constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." (2786)

The petitioner in Jackson was seeking Federal Habeas Corpus review of his case based on a claim that he had been convicted in a state court upon insufficient evidence; the question presented was what standard to apply. This Court answered the question thusly:

> "We hold that in a challenge to a state criminal conviction brought under 28 U.S.C., Sec. 2254 . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilty beyond a reasonable doubt". (2792)

This Court, in Jackson, specifically rejected the "no evidence" rule of Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (19__) as ". . . inadequate to protect against misapplications of the constitutional standard of reasonable doubt. . . ." (2790)

The case at bar presents a much stronger posture in that the trial court actually sustained a Motion For New Trial solely on the ground on insufficient evidence. The trial judge reasoned:

> "In the present case, I heard the same evidence the jury did, I am convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of a homicide committed by the defendant of this particular victim." (See Footnote 1 of Appendix A attached hereto.)

Thus, in the instant case, the question is not whether or not the evidence was insufficient, but is whether or not a finding of insufficient evidence made by the trial court on Motion for New Trial precludes a second trial.

The case of Burks v. United States, ___ U.S. _____, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), was cited to the Supreme Court of Louisiana in support of the proposition that the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's verdict has been set aside and a new trial ordered solely for lack of sufficient evidence to sustain the jury's verdict. In its opinion, Appendix A attached hereto, the Supreme Court of Louisiana in the first three and one-half pages, seemed to agree with the position of petitioner; however, about half way into the fourth page of the opinion, the Court began to discuss the difference in procedural application by the State of Louisiana to the questions of "no evidence" of the crime charged as opposed to "insufficient evidence".

The Court therein then set forth:

> "The question in the instant case is whether Burks compels the same result where the trial judge grants a motion for new trial on the grounds of insufficient evidence as opposed to granting the motion on the grounds of no evidence. We believe it does not." (Appendix A, page 5.)

The Louisiana Supreme Court then interpreted a quotation from Burks, as follows:

> ". . . we believe the holding in Burks (precluding a second trial) is limited to those cases where, as a matter of law, a reviewing court has determined that in a prior trial there was no evidence of the crime charged or an essential element thereof."

The issue is then clear. The Supreme Court of Louisiana has in its opinion stated that the sustaining of a motion for new trial solely for lack of sufficient evidence to sustain the jury's verdict grants the State a second chance to muster new evidence, but that a holding of no evidence of the crime charged or an essential element thereof would preclude a new trial in the State of Louisiana.

## CONCLUSION

Petitioner respectfully submits that the opinion handed down and filed on June 25, 1979, rehearing denied on September 4, 1979, by the Louisiana Supreme Court has applied the Fifth Amendment double jeopardy clause in a manner not in accord with the applicable decisions of this Court. namely, Burks, Jackson, and In Re Winship, supra. Petitioner further submits that the opinion of the Louisiana Supreme Court ignores the clear ruling of the trial court ". . . that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of homicide . . .", and that when the trial court so ruled that the cause for murder against petitioner was at an end, and that in accordance with the dissent of Justice Dennis, Appendix B attached hereto, this Petitioner's conviction should be reversed and set aside and Petitioner ordered discharged.

Therefore, for the reasons set forth above, Petitioner respectfully urges that the Writ of Certiorari be granted.

Respectfully submitted,

RICHARD OTTO BURST, SR., of
Burst & Dewart, Attorneys, Inc.
209 E. Oklahoma, P.O. Box 578
Guthrie, Oklahoma 73044
(405) 282-6936
Attorney for Petitioner

November, 1979.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument was served upon the following parties, by mailing such true and correct copies, postage prepaid, this 21st day of November, 1979.

Henry N. Brown, Jr.
District Attorney in and for Twenty-Sixth Judicial
District of Louisiana
Bossier Parish Courthouse
Benton, Louisiana 71006

William J. Guste, Jr., Attorney General
for State of Louisiana
State Capitol Building
Baton Rouge, Louisiana 70804

Supreme Court of State of Louisiana
301 Loyola Avenue
New Orleans, Louisiana 70112

RICHARD OTTO BURST, SR.

SUPREME COURT OF LOUISIANA

JUN 25 1979

STATE OF LOUISIANA

VS.

NUMBER 63,450

TRACY LEE HUDSON

ON WRIT OF CERTIORARI TO THE TWENTY-SIXTH JUDICIAL DISTRICT COURT, PARISH OF BOSSIER, HONORABLE CECIL C. LOWE, JUDGE.

* * *

BLANCHE, Justice.

The issue presented is whether the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's guilty verdict has been set aside and a new trial ordered pursuant to LSA-C.Cr.P.art. 851 solely for lack of sufficient evidence to sustain the jury's verdict.

Petitioner, Tracy Lee Hudson, was convicted by a jury of first degree murder, LSA-R.S. 14:30, and sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. Pursuant to his duty to pass upon the sufficiency of the evidence, State v. Daspit, 167 La. 53, 118 So.690 (1928); LSA-C.Cr.P. art. 851, Official Revision Comment (d); the trial judge granted petitioner's motion for a new trial upon finding insufficient evidence to support the verdict returned by the jury.[1] The granting or the refusal to grant a new trial is unreviewable by this Court, except for error of law. LSA-C.Cr.P. art. 858. Accordingly, the State's application for review erroneously asserting that the district

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1. In his Oral Reasons for Judgment, the trial judge stated:

"In the present case, I heard the same evidence the jury did, I'm convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of homicide committed by the defendant of this particular victim."

APPENDIX "A"

court may pass only upon whether there is "some evidence" was denied. 344 So.2d 1 (La.1977) Upon retrial the State introduced additional evidence, in particular an eye witness to the murder who had not been produced at the original trial. The petitioner was convicted by a jury of first degree murder for the second time and resentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. On appeal, the conviction and sentence were affirmed. 361 So.2d 858 (La.1978)

On October 2, 1978, petitioner applied for habeas corpus relief in the district court, alleging for the first time that the second trial in this case placed him in jeopardy a second time for the same offense in violation of the double jeopardy clause of the Fifth Amendment. The trial court denied relief, and petitioner applied to this Court. We granted petitioner's application to consider his plea of double jeopardy.

In Burks v. United States, __ U.S. ___, 98 S.Ct. 2141, 57 L.Ed2d 1 (1978), the United States Supreme Court announced that the double jeopardy clause of the Fifth Amendment precluded a second trial when a defendant's conviction is reversed by a reviewing court solely for lack of sufficient evidence to sustain the jury's verdict. In Burks, the defendant was convicted of bank robbery in federal district court and the trial judge denied his motion for new trial. On appeal, the defendant claimed that he had successfully established a prima facie defense of insanity through the testimony of three expert witnesses and the Government had failed to meet its burden of coming forward and proving sanity beyond a reasonable doubt. The Supreme Court observed:

> "... [T]he reviewing court went on to hold that the United States had not fulfilled its burden since the prosecution's evidence with respect to Burks' mental condition, even when viewed in the light most favorable to the Government, did not 'effectively rebut' petitioner's proof with respect to insanity

and criminal responsibility. In particular, the witnesses presented by the prosecution failed to 'express definite opinions on the precise questions which this court [of appeals] has identified as critical in cases involving the issue of [in]sanity.'" (98 S.Ct. at 2143--Empnasis added)

The court of appeal remanded the case to the district court, directing that court to enter a verdict of acquittal unless the State was able to present sufficient additional evidence to carry its burden. The defendant sought relief on double jeopardy grounds.

The Supreme Court in Burks held that a second trial would normally be permitted after a conviction had been reversed due to trial error, but that the double jeopardy clause prohibited a second trial after a conviction had been reversed fue to failure of proof. The Court explained the rationale for this distinction as follows:

"... In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. See Note, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 31 U.Chi.L.Rev. 365, 370 (1964).

"The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. ... Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal--no matter how erroneous its decision--it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." (98 S.Ct. at 2149-2150)

In precluding a second trial when a defendant's conviction has been overturned due to failure of proof at trial, the high

court expressly declined to follow prior jurisprudence which found a "waiver" of the double jeopardy guarantee whenever the defendant sought a new trial as one of his remedies in the trial court:

> "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial. ... To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled." (98 S.Ct. at 2150)

The double jeopardy protection of the Fifth Amendment is applicable to state criminal proceedings through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed2d 707 (1969); State v. Thompson, 366 So.2d 1291 (La. 1978).

While the case at bar involves the granting of a motion for new trial by the trial court for insufficient evidence rather than review at the appellate level, we deem the same principles are applicable to both.

LSA-C.Cr.P. art. 851 provides:

> "The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> "The court, on motion of the defendant, shall grant a new trial whenever:
>
> "(1) The verdict is contrary to the law and the evidence ...."

This provision permits the trial judge to grant a defendant a new trial if, in his opinion, the evidence is insufficient to convict. State v. Rollins, 351 So.2d 470 (La.1977); State v. Jack, 332 So.2d 464 (La.1976); State v. Jones, 288 So.2d 48 (La.1974). This Court's appellate jurisdiction in criminal matters extends only to questions of law, LSA-Const. Art. 5, § 5 (c), and it is only where a defendant has moved for a judgment

of acquittal in a trial before a judge alone (LSA-C.Cr.P. art. 778) or for a new trial based upon the contention that there is no evidence at all of the crime charged or an essential element thereof, is a question of law presented which this Court can review. State v. Cobbs, 350 So.2d 168 (La.1977); State v. Blacksline, 347 So.2d 193 (La.1977); State v. Jamerson, 341 So.2d 1118 (La.1977).

This Court has recognized that when it finds on review that in a prior trial there was no evidence of the crime charged or an essential element thereof, Burks precludes retrial, and a verdict of acquittal must be entered. State v. Thompson, 366 So.2d 1291 (La.1978); State v. Allien, 366 So.2d 1308 (La.1978); State v. Liggett, 363 So.2d 1184 (La. 1978). In State v. Thompson, supra, we noted that the Supreme Court indicated that the contention that there was no evidence of the crime charged or an essential element thereof may properly be raised solely by a motion for new trial. State v. Thompson, supra at 1293-94. Thus, if a trial judge granted a motion for new trial on the grounds that no evidence of the crime chargedor an essential element thereof, Burks, supra, and our holding in Thompson, supra, would require the trial judge to enter a verdict of acquittal.

The question in the instant case is whether Burks compels the same result where the trial judge grants a motion for new trial on the grounds of insufficient evidence as opposed to granting the motion on the grounds of no evidence. We believe it does not.

We believe the holding in Burks was addressed solely to those cases where a reviewing court (whether it be the trial judge or an appellate court) finds that as a matter of law, there was a failure of proof at the trial level. The Court, in Burks, explained:

> "The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. ... Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been submitted to the jury." (98 S.Ct. at 2149-2150--Emphasis added)

Interpreting this language in light of this State's rules regarding appellate review of evidence presented in criminal matters, we believe the holding in Burks (precluding a second trial) is limited to those cases where, as a matter of law, a reviewing court has determined that in a prior trial there was no evidence of the crime charged or an essential element thereof.

We are buttressed in this conclusion by what we feel was an attempt by the Court to narrow its holding in Burks:

> "... The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury finding the defendant guilty beyond a reasonable doubt. [Citations omitted] ... While this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, it is apparent that such a decision will be confined to cases where the prosecution's failure is clear. ..." (98 S.Ct. at 2150)

Because the trial judge herein ordered a new trial pursuant to LSA-C.Cr.P. art. 851 (1) solely for lack of sufficient evidence to sustain the jury's verdict (a factual determination entrusted exclusively to the trial judge under our law and jurisprudence), we hold that retrial of the defendant was not precluded by the double jeopardy clause.

DECREE

For the above and foregoing reasons, the judgment of the district court denying relator relief on his habeas corpus application is affirmed.

AFFIRMED.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus

No. 63,450

TRACY LEE HUDSON

* * *

Concurring Opinion

TATE, Justice.

I fully concur in the holding of the majority.

Although Burks v. United States, _____ U.S. _____, 98 S.Ct. 2141 (1978), has language that without close analysis seems to require upholding the double jeopardy plea, in my opinion the majority has correctly concluded that its rationale and holding are not applicable to the present situation.

Here, the record of the first trial shows that the state produced evidence sufficient to present the jury the question of the defendant's guilt of the crime. We would not have held, on appeal, that the evidence in that record was so insufficient as to constitute no evidence of the crime, so as to justify our setting aside the verdict of guilty.

Nevertheless, the trial judge was not completely satisfied that the accused's guilt was proved beyond a reasonable doubt. He did not grant a new trial for a reason that he did not think the state had produced sufficient evidence to prove guilt, but rather because he himself (to satisfy his doubts-- not the jury's, which had concluded otherwise) had personal doubts that the evidence was sufficient to prove guilt beyond a reasonable doubt. Commendably and conscientiously, he therefore ordered a new trial; otherwise, the sufficiency of the evidence would not have been reviewable by this court, despite his own doubts that the defendant's guilt was sufficiently proved.

The present is not an instance where the state did not prove its case at the first trial, so that granting a new trial gave the state a second chance to produce enough evidence to convict the accused. If so, as the majority notes, re-trial offends constitutional double jeopardy.

Rather, this is an instance where the state produced enough evidence to convict the accused at the first trial, but nevertheless the conscientious trial judge was troubled by a doubt concerning the defendant's actual guilt. In ordering the new trial, he did so to protect the accused (his denial of the new trial would have been unreviewable under our jurisprudence, since "some" evidence sufficient to support a verdict of guilt had been introduced).

In reality, the trial judge's reason for granting the new trial is better expressed by his authorization to do so whenever "the court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right," La.C.Cr.P. art. 851(5). Under these circumstances, I do not believe that Burks requires us to hold that double jeopardy is occasioned by a new trial granted for such reason.

I therefore respectfully concur.

X X X

JUN 27 1979

SUPREME COURT OF LOUISIANA

NO. 63,450

STATE OF LOUISIANA

VERSUS

TRACY LEE HUDSON

DENNIS, Justice, dissenting.

I respectfully dissent.

Although the Supreme Court in Burks v. United States, ____U.S.____, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) was not confronted with a case in the exact posture as the instant proceeding it is clear that the constitutional principles expounded there are applicable here. The high court flatly stated that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Id., 98 S.Ct. at 2147, 57 L.Ed.2d at 9. The Court's opinion provides no basis for limiting its holding to cases in which a reviewing court has set aside a conviction for evidentiary insufficiency. On the contrary, the Court supported its decision by pointing out that reversal for insufficient evidence should be treated the same whether made by the trial court or the reviewing court:

> "[I]t should make no difference that the reviewing court, rather than the trial court, determined the evidence to be insufficient . . . . To hold otherwise would

> create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court." Id., 98 S.Ct. at 2147, 57 L.Ed.2d at 9.

Moreover, in a companion case, United States v. Scott, ____U.S.____, 98 S.Ct. 2187, 2196-97, 57 L.Ed.2d 65, 77-78 (1978), the Supreme Court made it clear that the question of whether a trial court's ruling is to be treated as an acquittal for purposes of double jeopardy is not to be determined by the judge's own characterization of his action. The Court in Scott relied on United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), in which the Court made the following statement:

> "[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action. [citations omitted] Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."

Therefore, as I read Burks, Scott and Martin Linen, the double jeopardy clause has now been interpreted so as to prohibit a reprosecution of a defendant after a determination, by either a trial or appellate court, that the evidence introduced at trial was insufficient to sustain the verdict, regardless of the label placed on the motion and ruling by the defendant or the trial judge.

Additional support for this view may be found in the following language quoted with approvel in the recent United States Supreme Court decision in Greene v. Massey, ____U.S.____, 98 S.Ct.____, 57 L.Ed.2d 15, 20 (1978):

> "'Regardless of whether an appellate court or a trial jury makes the determination that the evidence is insufficient to sustain a finding of guilt

> as to a particular charge, and regardless of whether a petitioner moves for a new trial on other grounds in addition to asserting the ground of insufficiency of the evidence, it would seem that the double jeopardy clause would preclude giving the prosecution a second chance.'"

There appears to be no better reason for allowing the prosecution to retry such a case as the present one than there is to allow the prosecution, for example, to retry a defendant after discharging the jury upon discovering that it has insufficient evidence because of the absence of witnesses. See Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1965); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931).

Although it is not stated explicitly in any of the Supreme Court's recent opinions, their total effect apparently eliminates the possibility that a defendant may merely be granted a new trial upon a finding of evidentiary insufficiency and requires that a judgment of acquittal be entered instead. This result appears, moreover, to be consistent with the purpose underlying the prohibition against double jeopardy, as stated, for example, by the Supreme Court in Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Id., 355 U.S. 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199.

For the foregoing reasons, defendant's conviction should be reversed and set aside and the defendant ordered discharged.

SEP 4 1979

SUPREME COURT OF LOUISIANA

---

NO. 63,450

STATE OF LOUISIANA

VS

TRACY LEE HUDSON

---

ON WRIT OF CERTIORARI TO THE
TWENTY-SIXTH JUDICIAL DISTRICT COURT
PARISH OF BOSSIER
HONORABLE CECIL C. LOWE, JUDGE

On Application for Rehearing

Denied.

FWS

AT JR

WFM

FAB

Dixon, Calogero and Dennis, J.J., would grant a rehearing.

SUPREME COURT OF LOUISIANA
A TRUE COPY

Fraps J. Labranche, Jr.
Clerk of Court

Supreme Court, U. S.
FILED
JUN 11 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

No. 79-5688

---

TRACY LEE HUDSON, PETITIONER,

*v.*

THE STATE OF LOUISIANA, RESPONDENT.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

---

PETITION FOR CERTIORARI FILED
NOVEMBER 26, 1979
CERTIORARI GRANTED APRIL 14, 1980

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## DOCKET ENTRIES

| Date | Proceedings |
|---|---|
| *1977* | |
| January 4 | Indictment filed by Grand Jury |
| March 1 | Trial to Jury |
| March 2 | Guilty Verdict Returned |
| March 3 | Motion for New Trial filed and argued |
| March 7 | Motion for New Trial sustained on grounds of insufficient evidence |
| September 30 | New Trial to jury and guilty verdict returned |
| *1978* | |
| June 19 | Louisiana Supreme Court issues opinion denying appeal relief |
| August 31 | Rehearing denied by Louisiana Supreme Court |
| October 2 | Application for Writ of Habeas Corpus filed with Twenty-Sixth Judicial District Court, Bossier Parish, Louisiana |
| November 13 | Writ of Habeas Corpus argued and denied |
| November 20 | Application for Writ of Certiorari on Writ of Habeas Corpus filed |
| December 8 | Writ of Certiorari granted |
| *1979* | |
| March 9 | Writ of Certiorari argued before Louisiana Supreme Court en banc |
| June 25 | Majority and a concurring opinion issued by Louisiana Supreme Court affirming District Court denial of Writ of Habeas Corpus |
| June 27 | Dissenting opinion issued |
| September 4 | Rehearing denied |

**IN THE TWENTY-SIXTH JUDICIAL DISTRICT COURT**
**IN AND FOR THE PARISH OF BOSSIER**
**STATE OF LOUISIANA**

STATE OF LOUISIANA

*v.*

TRACY LEE HUDSON

**No. 54,929**

[1] EVIDENCE adduced on the trial of the above entitled and numbered cause, before His Honor, Graydon K. Kitchens, Jr., Acting Judge of the Twenty-Sixth Judicial District Court in and for the Parish of Bossier, State of Louisiana, on the 3rd day of March, 1977 and the 7th day of March, 1977, at Benton, Louisiana.

APPEARANCES:

ROLAND V. MCKNEELY, JR.
*Assistant District Attorney*
*for Bossier Parish*

HARVEY P. DELAUNE
*Assistant District Attorney*
*for Bossier Parish*
*Counsels for State of Louisiana*

H. C. COOPER
*217 North Harvey, Suite 401*
*Oklahoma City, Oklahoma 73102*
*Counsel for Defendant*

**MARCH 3, 1977**

[2] THE COURT: I believe there has been a Motion for a New Trial filed and the hearing fixed this morning for the convenience primarily of the counsel for the defendant who were from out the state, and would have had to make another trip to the state next week had the matter been delayed. This is number 54,929, State of Louisiana versus Tracy Lee Hudson. Has that document been filed?

MR. COOPER: No, Your Honor. I'd ask permission of the Court to file it at this time.

THE COURT: All right, sir, you may file the motion. I believe the District Attorney, Mr. McKneely, you had indicated no objection to the hearing of this matter this morning for the purpose, or the reason stated.

MR. McKNEELY: That's correct, Your Honor.

THE COURT: Mr. Cooper, you may proceed with your presentation of argument on the motion.

MR. COOPER: Thank you, sir. Your Honor, I first want to express my appreciation to you and to the District Attorney for hearing us this quickly on the motion. I want to tell you how much I appreciate you accommodating us to hear this motion now, and also express my appreciation to the District Attorney's office by them agreeing that we could hear it now, which would save us another expensive trip here. Your Honor, insofar as the motion itself is concerned, I would first direct the Court's attention to, number one, the verdict of the jury is contrary to the law and the evidence. Your Honor, in that regard, I would submit to the Court, that the verdict of the jury, in my opinion, is—was not [3] supported by the evidence that they heard. I feel that the case presented by the state did not justify a verdict of guilty in accordance with the instructions that the Court gave the jury and the rules of law that they were to follow and apply to the facts presented to them in their reaching a verdict. Number two, I have no desire to comment on the second allegation in the motion. And I would not go to number three. And in that regard I would say to the Court that I sincerely believe that we witnessed a gross miscarriage of justice committed by the jury in this case. I feel that for some reason unknown to me and I've spent a lot of time since then trying to figure it out, I do not see how twelve people could have arrived at that verdict. I would further submit to the Court, in all due respect to Your Honor, I feel that to not to sustain the Motion for a New Trial would be to compound the travesty on justice which resulted in the verdict returned by the jury. I would say further that Your Honor

heard the testimony and the evidence, you saw the witnesses as I did, and you've been listening to me talk for about three days, so I would not comment further except to say that I would urge the Court, in all sincerity, to correct this miscarriage of justice, and grant this defendant a new trial. That's all I have to say, Your Honor.

MR. McKNEELY: May it please the Court, of course, my position is completely the opposite of that of Mr. Cooper. I point out to the Court the language of the Supreme Court of the State of Louisiana used in the case of State versus Malmay. It's been cited a number of times, it's an older case, 24 Southern Second, 869. The Court, at page 870 said, in all cases triable [4] by a jury, that jury is the judge of the evidence and while the trial judge may grant a new trial when the evidence does not support the verdict, it is not the province of the Court in such a case to determine what verdict the jury should have returned, and he should never in any case grant a new trial except when a verdict returned by the jury was prejudicial to the accused. In a very recent case, 1975, case, State versus Pryor, 306 Southern Second, 675, 1975 case decided by the Supreme Court, the case was tried in Caddo District Court, the trial jury there convicted the defendant of burglary as charged. There was one piece of evidence in that case, one piece of evidence. The jury convicted that defendant, and that defendant went to the Supreme Court claiming that that verdict was contrary to the law and the evidence. That piece of evidence was a fingerprint found on a filing cabinet on the premises that had been burglarized. That fingerprint was the fingerprint of the defendant, there was nothing further. There was no evidence of any kind whatsoever, there was no evidence of when the print was put there, even though this defendant that had been convicted had been a former employee of the establishment that operated out of those premises. The Court said that there was sufficient evidence, and the Court there discussed the circumstantial evidence business and whether, of course, there was not an eye witness to see him, but they discussed all of it, and they said that it was slim evidence in that case, I certainly admit it was

slim because the evidence we submitted to that jury was abundantly more than that, but I'm using that case as an illustration because in that case nobody saw the defendant go in, nobody saw him come out, nobody could put him there, [5] except there was his fingerprint on the filing cabinet. Now there is evidence to show that the fingerprint probably had not been there a great, great long period of time, but there was no evidence whatsoever, even the experts couldn't say that that fingerprint was even put in there on the night of the burglary. It was found the next morning, but nobody could say that it had been put on there the night before, the night before that, and the night before that, or the week before that, but obviously it hadn't been there for months because of the drying process. So I submit to the Court in that case, the Louisiana Supreme Court says that is enough evidence, did not merit a directed verdict, it was enough evidence to sustain a conviction in that case. If that's the case, if that's the status of the law of Louisiana, the evidence as presented—that's been presented here, and I won't review it, the court has heard it, is ample, not only of the evidence negativing the presence of other people around, the person had the motive, the person had the opportunity, the person who took the steps to cover up the crime as he admitted, the person who made the inconsistent statements, all that together gives ample evidence. And I submit there is no basis whatsoever for the granting of a new trial.

MR. COOPER: Your Honor, may I respond?

THE COURT: Yes, you may.

MR. COOPER: Your Honor, I am not familiar with the case that counsel quotes, but I would call this to the Court's attention. When a fingerprint is found, that's one direct evidence, not only that, but that is tantamount to the defendant leaving [6] his signature there and a written confession that he was there. I would further point out to the Court, we do not know about the facts in that case to know whether the individual who was the defendant in the case quoted by counsel, how long since he had worked for

this company that was the victim of the burglary, we do not know whether or not in his work he had access to the part of the building where the fingerprint was found, and if he had been there in his duties or would have any reason to be there. We don't know all those things. It could be that he had never been in that part of the building in his job. That may have been part of the evidence. We don't know that. But I submit to the Court that the reason that the legislature of this state added this paragraph to this statute, paragraph number three, the reason they did was to permit a Court, a Judge, to prevent a travesty on justice, to correct a ghastly wrongdoing. That was the purpose of this statute, the very reason why it is on the books. And this is a classic example of why this paragraph is needed and why Your Honor has the power to grant a new trial under these circumstances and in conformance with this statute. And I again say to the Court, that if a new trial is not granted, I submit that we would be compounding the travesty on justice which has already been perpetrated, and I would again seriously, with every fiber in my being, submit to the Court that this motion should be sustained.

MR. McKNEELY: I have only one comment to that, and that is directed to counsel's statement that the finding of a fingerprint and the testimony concerning that finding is direct evidence, which he contends, and yet he says that the testimony of eye [7] witnesses putting, not a fingerprint, not a signature, not a trademark, not any identifying item, but putting the defendant face to face with the victim immediately prior to his killing is not evidence of his having been there. That's much, much, much better testimony than the testimony of having found the fingerprint, and how long it had been there, they don't know, much, much more direct testimony.

THE COURT: I'm familiar with the Pryor case, not the law that you cited it for but for other reasons. Would you give me the citation of the other case, please?

MR. McKNEELY: The citation of the Pryor case?

THE COURT: I think I have it—give that to me, too.

MR. McKNEELY: That's—it's a different one from the Pryor that we normally—

THE COURT: How do you spell it then?

MR. McKNEELY: P-r-y-o-r. And the citation on Pryor is 306 Southern Second, 675.

THE COURT: 306, Second, 75?

MR. McKNEELY: 675.

THE COURT: 675.

MR. McKNEELY: Yes sir.

THE COURT: And the other case you cited?

MR. McKNEELY: The other case is State versus Malmay. 24 Southern Second, 869.

THE COURT: Spell Malmay.

MR. McKNEELY: M-a-l-m-a-y.

[8] THE COURT: Gentlemen, I'll state at this time that I have a very definite opinion about this motion at this moment. But under the circumstances I have not reviewed any juris prudence over the last twelve hours because I really was a little bit too tired to go to the office, but I intend to before I make a decision. I do not care to comment further until I've read some of these cases, these two in particular and others that I may find on the same subject. I believe the defendant has been remanded for sentencing until next Tuesday?

MR. COOPER: Yes sir.

THE COURT: And I will make a decision, I will notify counsel, and have the Clerk notify counsel, today is Thursday, it may be as late as Monday before I do that, but I will certainly do so not later than Monday during the day, and if possible I will render it tomorrow. I do want to read some cases before I make that decision. And I appreciate your argument and consider the matter submitted at this time.

**MARCH 7, 1977**

[9] THE COURT: This is State of Louisiana versus Tracy Lee Hudson, 54,929, in which on Thursday morning

of last week, with the consent of the District Attorney, a Motion for a New Trial was filed and argued so that the two out of state attorneys might not be delayed until, or have to return from Oklahoma City this week. The Motion for a New Trial contained, as I recall, I don't have it before me, but there were three, I believe there were three allegations in that motion, the first one being the verdict of the jury, the guilty verdict, murder one, is contrary to the law and the evidence, and the second had to do with the impropriety of some of the rulings by the Court on evidentiary matters, as I recall it, and the third one to the effect that even though the defendant were not entitled to a new trial as a matter of right, justice demanded a new trial, or failure to grant it would be prejudicial to the defendant, I believe I'm paraphrasing those grounds. The argument was, however, that there was no evidence presented that would have justified the jury in finding the defendant guilty as charged because there was no evidence beyond a reasonable doubt before the jury of the essential elements to prove the essential elements of the crime. The State cited two cases, which I'll refer to briefly in a moment, no cases were cited by the defendant that I recall. The Court in its charge to the jury, which I have before me, charges the elements of the crime of first degree murder are "the killing of a human being" and specific criminal intent "to kill or to inflict great bodily harm". Further charged the jury that both these elements, and I chose to call them two elements, both these elements must be proved beyond a reasonable doubt, and further in order to convict [10] this defendant of the crime charged in this case, then you must be convinced by the evidence beyond a reasonable doubt that he did, in fact, kill Wendell Gale Craig, and did so with the specific criminal intent to kill or to inflict great bodily harm. The State argued that there was evidence justifying the jury verdict. I believe that the record will reflect, of course, what each side argued, that their argument stated that there was motive and opportunity, and possibly something else, established by the evidence. I now refer to these two cases which counsel for the state relied on, State versus Pryor, P-r-y-o-r, 306 South-

ern Second, 675, and it's a 1975, January 1975 case, and I gather from the argument that the only evidence before the Court was a single fingerprint of the defendant, in that case a verdict of guilty of the charge of burglary, simple burglary, was found and the conviction was affirmed in the face of a, first a motion for directed verdict, I believe, and then also a Motion for a New Trial. That was not all of the evidence that the Supreme Court found in the record. After commenting that the evidence must prove beyond a reasonable doubt the essential elements, which they set forth as the unauthorized entry and the intent to commit a theft, they coupled the fingerprint of the defendant found on a filing cabinet with the testimony of the store owner that nobody was authorized inside that area of the building except himself and he did not leave the store unattended and when he left it he locked it, and therefore, he knew that nobody went back to that area where the cabinet was located. Further evidence—well, those two things the Supreme Court found would justify the jury in having found the unauthorized entry, fingerprints present, the storekeeper's testimony that nobody [11] could have had his authority to go back there because he just didn't permit it. No question about the theft, because a portion of the money and watches taken from the cabinet on which the fingerprint was found, so they had the proof of the essential elements. The Court made two comments, the state just bearly made out its case and they also said that as uncomfortably close as the state came to not presenting its case there were some evidence of the essential elements. The other case cited was a '46 case, State versus Malmay in 24 Southern Second, 869, which really I didn't feel was particularly pertinent. In that case the jury found a responsive verdict of negligent homicide on an indictment of manslaughter, and the argument was whether or not they could properly come up with a negligent homicide verdict, and the main holding in that case was the Judge couldn't substitute his judgment for the jury's judgment on which verdict they find when there was evidence to sustain the verdict, and that was a responsive verdict. Now, other cases, and I'm not going into the factual situa-

tion of everyone of them that I read, I don't think it is necessary, but I'll mention the name and the citation. State versus Nathan Bradley, 310 Southern Second, 582, a 1975 case, which incidentally was a judge trial, nevertheless the same law is applicable. State versus Bass, a 1975 case, in November, cited by or written by our Judge James Bolin while he was on the Supreme Court, another judge tried case, night hunting, a conviction reversed, no evidence of the essential elements of the crime. While the evidence, he commented this in his opinion, while the evidence is construed as supporting a suspicion the defendant may have engaged in this illegal activity, there is an absolute lack of [12] evidence the crime was, in fact, committed, quoting from State versus Bradley, when the state fails to prove an essential element of the crime charged a directed verdict must be granted. The same law applies as I see it, because most of these cases up two ways, first on a motion for a directed verdict, which was denied, and then a motion for a new trial on the same grounds, which was denied. State versus Williams, 323 Southern Second, 801, a December 1975 case with Associate Justice Tate writing, a man convicted of theft of property valued over $500.00, an automobile as a matter of fact, and he went into the requirement that the state proved, and found they did in the case, actually prove a theft, although the man, the defendant claimed there was a sale, payment just not been made. So the substance, and there are other cases, State versus Benson, for example, a '73 case, 284 Southern Second, 563, that's a manslaughter conviction, again the Court saying there was evidence to support all the essential elements of the crime as well as the killing was not justifiable. That was on a Motion for a New Trial. In the present case, I heard the same evidence the jury did, I'm convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of the homicide committed by this defendant of this particular victim. The only thing the Court could determine was that the jury, by some possible misinterpretation of the charge on circumstantial evidence have come up with an inference that merely because this defendant was seen in

the street the same time the victim was, shortly, and there again the time element was not established, very short time, we'll put it that way, before the victim staggered into the trailer, so the testimony was and died [13] that this must have been the person that did it. This overlooks one very important question in this Court's mind, and that is that the last person I recall testifying as having seen the defendant in the street with the victim saw two people in the street with the victim. And how they concluded that this defendant committed the act from that evidence when no weapon was produced, no proof of anyone who saw a blow struck, is beyond the Court's comprehension. The other element, of course, is the specific criminal intent to kill or to inflict great bodily harm. Having reached—I'm just having to assume because I have no idea how they reached this conclusion, so I'm having to assume that they reached the conclusion that since they concluded this defendant struck the blow, that he could not have struck such a blow without some intent to inflict great bodily harm. I think if there were grounds for their first conclusion there might be some justification for reaching the second one, but I do not find any justification for the first, therefore, I do not find how they rule from the evidence that this defendant had that specific criminal intent. For those reasons, this Court grants a new trial in this case.

MR. DeLAUNE: Your Honor, the state gives notice of its intention to request supervisory writs.

THE COURT: Very well. The Court will grant you an adequate time and I believe that twenty days would be ample time in which to perfect such application.

MR. DeLAUNE: Thank you.

[14] **REPORTER'S CERTIFICATE** (omitted in printing)

# SUPREME COURT OF LOUISIANA

## No. 61385

STATE OF LOUISIANA

*v.*

TRACY LEE HUDSON

**APPEAL FROM THE TWENTY-SIXTH JUDICIAL DISTRICT COURT, PARISH OF BOSSIER, LOUISIANA. HONORABLE CECIL C. LOWE, JUDGE.**

DIXON, Justice

Defendant Tracy Lee Hudson was indicted for first degree murder of Wendell G. Craig, in violation of R.S. 14:30. A jury trial was conducted and on March 2, 1977 defendant was found guilty as charged. A motion for new trial was granted by the trial judge on the ground that there was no evidence to sustain a conviction. The State's application for writ of certiorari was denied on April 7, 1977. 344 So.2d 1(La. 1977).

On retrial September 26–30, 1977 the jury returned a guilty verdict and recommended a sentence of life imprisonment without the benefit of probation, parole or suspension of sentence.

The crime occurred in a Bossier City trailer park. Several people, acquainted because the men worked together, had gathered at the mobile home of the Yorks, near the one occupied by defendant and his wife. Some were loud and very drunk (including the victim). One member of the party (who, with his wife, were the only blacks involved) had parked very close to defendant's trailer, and was noisy and slow to leave. Defendant emerged from his mobile home, remonstrated and argued with the black who became distressed and drove off without the victim, who was depending on him for a ride home. The victim and the defendant then argued. The defendant testified that his wife suddenly terminated the argument by stabbing the victim. The defendant and his wife then withdrew to their mobile home. Defendant said the victim continued to make loud

noises outside for awhile, but that it became quiet. The Yorks testified that the victim made his way back to their mobile home and fell dead on the floor.

On appeal, defendant relies upon three assignments of error for reversal of his conviction and sentence.

**ASSIGNMENT OF ERROR NO. 1**

By this assignment, defendant contends that the trial court erred in failing to sustain his motion to suppress the testimony of a State witness, Dennis Plunkett, or in refusing to allow an evidentiary hearing in support of defendant's motion.

Defendant sought to exclude the testimony of the witness on the ground that the State had not acted with "clean hands." Defendant alleged in argument on the motion that he would attempt to show, by way of an evidentiary hearing, that the witness was served a subpoena by the sheriff's office, and that there was no subpoena or return on the subpoena filed in the record in the clerk's office. He argues that, although the identity of State witnesses is not normally discoverable (see, e.g., State v. Thornton, 351 So.2d 480 (La. 1977)), as a practical matter, that information becomes available on the public record when subpoenas and returns on subpoenas are filed with the clerk of court. Plunkett was an important witness—the only one to testify that he had seen Tracy Hudson stab Craig. Plunkett had not testified at the first trial, although he said he had given his name to the investigating police. The prosecutor interviewed Plunkett for the first time a few weeks before the second trial.

Even if it could be shown that the State acted with impropriety (we find none), defendant has failed to show he was prejudiced by not discovering the witness' identity earlier. Defense counsel became aware of the State's intention to call Plunkett after the jury was chosen, and then indicated to the court he had been caught by surprise. The trial was recessed until the next morning, and the trial judge excused the other witnesses to give defense counsel an opportunity to interview Plunkett before the

resumption of trial the next day. It is apparent that defendant had the opportunity to complete trial preparation before any witnesses were called.

There is no merit to this assignment.

**ASSIGNMENT OF ERROR NO. 2**

Defendant contends the trial court erred in sustaining the State's objection to certain testimony of Ms. Sonya Peters, defendant's attorney, during the first trial.

At defendant's first trial, less than seven months earlier, he had been represented by two lawyers from Oklahoma. (Defendant was a horse trainer, had been a resident of Louisiana for only a short time, and had previously lived in Texas and Oklahoma). The Oklahoma lawyers associated Sonya Peters, a Shreveport lawyer, to assist them in the trial. According to defense counsel, Ms. Peters was prepared to testify that, in preparation for the first trial, she was told by one of the Oklahoma lawyers that Helen Hudson, defendant's wife, had said she was the one who stabbed Craig and that Helen Hudson admitted to Ms. Peters that she was, indeed, the one who stabbed Craig.

In State v. Gilmore, 332 So.2d 789 (La. 1976), we recognized that evidence that another person had admitted doing the act for which defendant was on trial and was not inadmissible even though it was hearsay (evidence of a statement made out of court, offered to show the truth of matters asserted therein; State v. Martin, 356 So.2d 1370 (La. 1978)).

We recognized in the Gilmore case that such an extrajudicial statement admitting the commission of a crime fell within the exception to the hearsay rule as an admission against the defendant's penal interest. The source of credibility for the out-of-court admission is the assumption that a person normally would not admit the commission of a crime if it were not true.

If the person who is said to have made the prior admission is present as a witness against the defendant, he is

subject to cross-examination on the matter of his prior admission; if he denies making it, evidence of his out-of-court declaration is admissible. R.S. 15:493. In such case, all the parties with knowledge are before the court, and the jury can make the factual finding based on testimony. Where, however, the person who is said to have made the proir confession is not before the court, the chance of fabrication of testimony that another has confessed increases, and its reliability diminishes. Where, however, the defendant has made known his belief that another has confessed, and has diligently sought the attendance of that person at trial to prove his admission, only to be thwarted by the death (State v. Gilmore, supra) of the witness, or by his refusal to incriminate himself (see, e.g., Sutter v. Easterly, 162 A.L.R. 437, 444, 189 S.W.2d 284 (1945); U.S. v. Mulholland, 50 F.413 (D.C. 1892); see also State v. Morrow, 260 La. 72, 78, 255 So.2d 78 (1971) (Summers, J. dissenting); cf. State v. May, 339 So.2d 764, 770 (La. 1976) ), indicia of the genuine character of the defense is present. The rule developed that, if the out-of-court declarant were "unavailable" as a witness, testimony that the missing person had made the admission against penal interest is admissible.

Here defendant never revealed that his wife had confessed until the trial itself. She had testified at the first trial, apparently to the effect that she was present and her husband did not stab the deceased. Defendant testified that he did not stab the victim. At his second trial, he explained the failure of his wife and himself to reveal her as the culprit by the assertion that no one asked either of them if his wife had done the act. The only evidence in the record about the whereabouts of Helen Hudson at the time of the second trial is the testimony of defendant, who said he had not seen or heard of or about his wife since she left the courtroom after the first trial seven months earlier. There is no evidence of any effort to locate her or to obtain her presence at trial.

Although defendant was an indigent at the time of the second trial, and represented by the indigent defender, it

is hardly conceivable that the aid of law enforcement officials could not have been enlisted to locate one who confessed to stabbing another to death.

Wigmore explains that the purpose and reason of the hearsay rule is the key to the exceptions to it. 5 Wigmore on Evidence, § 1420 (Chadbourn rev. 1974). The hearsay rule is based upon its unreliability, and the first principle supporting exceptions to the hearsay rule, Wigmore says, is the "necessity" principle; that is, the witness whose out-of-court declaration is needed is dead or *otherwise unavailable*, making necessary the introduction of the hearsay testimony.

The record before us does not demonstrate that the first principle of the exceptions to the hearsay rule has been satisfied. The unavailability of Helen Hudson has not been demonstrated. The circumstances of her absence tend to show the *unreliability* of her purported admission that she stabbed Craig. We cannot conclude, from the absence of evidence about efforts to obtain the presence of Helen Hudson for trial, that defendant was relegated by necessity to the use of hearsay testimony.

Proof of Helen Hudson's unavailability was essential to bring the testimony of Ms. Peters within the exception to the hearsay rule.

There is no merit to this assignment.

**ASSIGNMENT OF ERROR NO. 3**

Defendant contends that the trial court erred in denying his motion for new trial which alleged that the verdict is contrary to the law and the evidence (C.Cr.P. 851 (1)), and the interests of justice would be served by granting a new trial (C.Cr.P. 851 (5) ). Specifically, defendant raised the same allegation as in Assignment No. 1 (see that discussion above). In addition, he contended that the testimony of Dennis Plunkett, the only alleged eyewitness to the stabbing, was perjured and should be disregarded; therefore, he argues that there was *no* evidence upon which a verdict of guilty could have been based and a new trial should have been granted.

Several witnesses testified that they saw defendant arguing with the victim prior to the stabbing, but none, other than Plunkett, stated that they actually saw defendant stab Craig. Plunkett was not called to testify at defendant's first trial (the witness himself stated that he gave his name to a police officer as a witness "but my name got lost somewhere"). Plunkett testified that while he was visiting a friend, Michelle Davenport, who lived in the same trailer park where defendant lived and where the incident took place, he saw Lori Miramontz run over the the Davenport trailer and overheard her saying that two men were arguing and fighting. According to Plunkett, at that point he jumped a fence behind the defendant's trailer and arrived on the scene in time to see the defendant stabbing Craig.

Defendant alleges that Plunkett's testimony varies to such an extent from that of Lori Miramontz and Joy Heath that he must have committed perjury on the stand and his testimony should be disregarded. The testimony is conflicting in certain regards; however, the conflict does not reach the extent that it must be concluded that Plunkett's testimony was perjured. Compare State v. Ellender, 354 So.2d 500 (La. 1978), where eight defense witnesses testified in direct conflict (and it was stipulated that nine more defense witnesses would so testify) to the testimony of a State witness which testimony was crucial to a determination of the defendant's guilt or innocence.

From Lori Miramontz' testimony on direct examination it appears that she and Joy Heath observed defendant and Craig arguing in front of a trailer owned by Mr. and Mrs. Russell York, left before anything further happened, returned to the York trailer where she saw the injured Mr. Craig, and ran to the Davenport trailer where she asked Michelle Davenport to call the police. She testified that she did not see Plunkett until she got to the Davenport trailer. The testimony became confused, however, in redirect when she stated she went to the Davenport trailer after "the argument" but did not specify that it was after Mr. Craig had been stabbed. Joy Heath's testimony was

basically to the same effect and indicated that she and Lori did not go to the Davenport trailer to make a phone call until after the stabbing had occurred which was the first time she saw Plunkett.

In any event, defendant exploited the inconsistency in closing argument in an apparent attempt to convince the jury to disbelieve Plunkett's testimony. When a conflict in testimony arises as to a factual matter, such as this, the question of the credibility of the witnesses rests within the sound discretion of the trier of fact. That factual determination will not be disturbed on review unless clearly contrary to the evidence. See, e.g., State v. Cobbs, 350 So.2d 168 (La. 1977); State v. McSpaddin, 341 So.2d 868 (La. 1977); State v. Alexander, 328 So.2d 144 (La. 1976).

This assignment is without merit.

The conviction and sentence are affirmed.

**26TH JUDICIAL DISTRICT COURT**
**BOSSIER PARISH, LOUISIANA**

STATE OF LOUISIANA

*v.*

TRACY LEE HUDSON

**APPLICATION FOR WRIT OF HABEAS CORPUS**

TO THE HONORABLE, THE TWENTY-SIXTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF BOSSIER, STATE OF LOUISIANA:

The petition of Tracy Lee Hudson respectfully represents:

1.

Petitioner is being held in the Bossier Parish Jail by Sheriff Vol Dooley, Sheriff of Bossier Parish, State of Louisiana.

2.

Petitioner was indicated by the Bossier Parish Grand Jury by indictment filed January 4, 1977, charging petitioner with first degree murder, all of which will be more fully shown by reference to the indictment filed in these proceedings.

3.

Petitioner was first referred to the 26th Judicial District Indigent Defender Board for representation.

4.

Subsequently, petitioner employed his own counsel, namely, H.C. Cooper and Sonia Peters.

5.

On March 2, 1977, defendant, after trial, was found guilty as charged, all of which will be more fully shown by reference to the minutes of this cause.

6.

The defendant, through his counsel, on March 3, 1977, filed a motion for a new trial. This Honorable Court, on March 7, 1977, for reasons set forth in an oral opinion by Judge Enos C. McClendon, Jr., which are referred to and made a part hereof by reference, granted a new trial in the State of Louisiana on March 7, 1977, on the grounds that the evidence adduced was legally insufficient to support a conviction of first degree murder.

7.

Defendant was tried again and convicted and sentenced to life imprisonment without benefit of probation, pardon, or parole.

8.

The defendant's conviction and sentence herein were illegal, unconstitutional, and must be set aside for the following reasons:

9.

Petitioner is in custody by virtue of a sentence for an offense for which he could have successfully pleaded double jeopardy, but did not do so, to-wit, that in the matter entitled State of Louisiana v. Tracy Lee Hudson, Number 54,929 of the docket of the 26th Judicial District Court, Parish of Bossier, State of Louisiana, petitioner was in jeopardy for the same offense within the meaning of Title XVIII, Code of Criminal Procedure, as he was in the trial of the offense for which he was convicted and sentenced and is now being held in custody.

10.

In the recent case of *Burks v. U.S.*, 98 S. Ct. 2141 (June 14, 1978), the Supreme Court of the United States held that as a matter of constitutional law, Amendment 5 to the Constitution of the United States "*forbids a second trial for the purpose of affording the prosecution another op-*

*portunity to supply evidence which it failed to muster in the first proceeding.*" (Underlining added for emphasis).

11.

The Supreme Court, in *Burks v. U.S., supra,* held specifically that "*The double jeopardy clause precludes a second trial, once the reviewing court has found the evidence legally insufficient,*" and "*the only judicial remedy available for that court is the direction of a judgment of acquittal. To the extent that our prior decisions suggest that by moving for a new trial defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled.*" (Underlining added for emphasis.)

12.

Pursuant to Louisiana Code of Criminal Procedure, Article 362(6), the defendant must be discharged.

13.

Subsequent to defendant's conviction herein, the Supreme Court of the State of Louisiana ruled in the case of *State of Louisiana v. Aaron Payton,* Number 62,338, decided July 3, 1978, that *first degree murder must as a matter of constitutional law, contain at least one of the five aggravating circumstances as enumerated in State v. Payton (supra).* (Underlining added for emphasis.) The Court therein clearly states:

> "The sum of the legislative and judicial action limits capital murder to specifically intended homicides committed in five situations:
> 1) murder committed in the course of aggravated rape, aggravated kidnapping, aggravated burglary, armed robbery, or attempts to commit these crimes;
> 2) murder of a fireman or peace officer engaged in his lawful duties;
> 3) murder by which the offender knowingly created a risk of the death or great bodily harm to more than one person;

4) murder committed for remuneration;
5) murder committed by a prison inmate while serving sentence for a felony.
*Any other specifically intended homicide constitutes second degree. murder* (emphasis added, slip op. p. 13)."

14.

The evidence presented in the trial of this cause is totally devoid of any proof of aggravating circumstances; therefore defendant's indictment, conviction, and sentence were constitutionally defective in accordance with the decision of the Louisiana Supreme Court in *State of Louisiana v. Aaron Payton, (supra).*

15.

Because of the failure of the proof to establish the constitutionality essential aggravating circumstances, defendant's conviction and sentence was without due process of law; therefore, pursuant to the Louisiana Code of Criminal Procedure, Article 362(9), the defendant must be discharged.

WHEREFORE, PETITIONER PRAYS THAT:

1. A Writ of Habeas Corpus issue herein to Sheriff Vol Dooley, Sheriff of Bossier Parish, State of Louisiana, to produce in Open Court, at such time and on a date to be fixed by this Honorable Court, petitioner herein, Tracy Lee Hudson, the person unlawfully confined, and then and there a true and correct return make of the reason and cause of the detention of petitioner.

2. After due proceedings had, petitioner be discharged and released from further detention and confinement, and all such orders issue which are necessary and proper in the premises and to which he may be entitled.

S. PATRICK PHILLIPS
*Chief Assistant Indigent Defender*
*Office of the Indigent Defender*
*405 Bossier Parish Courthouse*
*Benton, Louisiana*

**AFFIDAVIT**

STATE OF LOUISIANA
PARISH OF BOSSIER

BEFORE ME, the undersigned authority, Notary Public in and for the Parish and State aforesaid, personally came and appeared: TRACY LEE HUDSON, who, after being duly sworn, stated that:

All of the allegations contained in the foregoing application for a Writ of Habeas Corpus are true and correct to the best of affiant's information and belief.

s/ TRACY LEE HUDSON

SWORN TO AND SUBSCRIBED before me this 29 day of Sept., 1978.

s/ ERNESTINE LEE
*NOTARY PUBLIC*

**ORDER**

Considering the foregoing petition,

IT IS ORDERED that a Writ of Habeas Corpus issue herein, directed to Sheriff Vol Dooley, Sheriff of Bossier Parish, Louisiana, commanding him to bring the body of Tracy Lee Hudson before this Court at 9:30 o'clock, a.m., on the 10 day of Oct., 1978, in the Criminal District Courtroom, Courthouse Building, Benton, Louisina, and then and there, together with any and all other persons having an interest in these proceedings, state by what authority the said Tracy Lee Hudson is held in custody.

BENTON, LOUISIANA, this 29 day of Sept., 1978.

s/ LOTT PODGETT
*JUDGE, 26th Judicial District Court*
*Bossier Parish, Louisiana*

**IN THE TWENTY-SIXTH
JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF BOSSIER
STATE OF LOUISIANA**

State of Louisiana
Vs. No. 54,929

| DATE OF ORDERS | ORDERS OF COURT |
|---|---|
| 10/10/78 | Application for writ of habeas corpus is continued to October 17, 1978. |
| 10/17/78 | Application for writ of habeas corpus is continued to November 13, 1978. |
| 11/13/78 | Defendant is in open Court, represented by counsel, Pat Phillips from Indigent Defender Board and Richard Burst. Application for writ of habeas corpus is called. Complete record in these proceedings is filed in the record. Writ is argued and denied. Defendant gives notice of intention of applying for writs to La. Supreme Court and is given 15 days to perfect writs. |

**IN THE TWENTY-SIXTH JUDICIAL DISTRICT COURT**
**IN AND FOR THE PARISH OF BOSSIER**
**STATE OF LOUISIANA**

No. 54,929

STATE OF LOUISIANA

*v.*

TRACY LEE HUDSON

[1] RULING OF THE COURT on WRIT OF HABEAS CORPUS of the above entitled cause, before His Honor, Cecil C. Lowe, Judge of the Twenty-Sixth Judicial District Court in and for the Bossier, State of Louisiana, on November 14, 1978, at Benton, Louisiana.

APPEARANCES:

PATRICK PHILLIPS
*Indigent Defender Board*
*Counsel for the Defendant*
*Courthouse*
*Benton, Louisiana*

RICHARD BURST
*209 E. Oklahoma Street*
*Guthrie, Oklahoma 73044*
*Assistant Counsel for Defendant*

ROLAND MCKNEELY
*Assistant District Attorney*
*Bossier Parish, Louisiana*

[2] THE COURT: Gentlemen, I think in all fairness to everyone, this I indicated to you in chambers that I would try to rule on this matter as soon as possible, because one of you would be applying for writs. I want to give you an opportunity to do so as soon as possible. I may as well, in order to not delay this matter—I have read your brief, I've heard Mr. McKneely's argument. In reading the brief and I realize in this particular case there are striking

similarities with Burks and in one matter in connection with this case there was evidence that was not presented at the first trial. At the time of the first trial and the ruling of the Trial Judge, after the jury had returned its verdict, a new trial was granted. That was the vehicle that was available to the defendant to grant him relief for whatever matters within the discretion of the Judge and within the code would be his reason for granting a new trial and if he did not, of course, then there would have been the—the defendant would have had a right to appeal. The Judge, in his discretion, did grant a new trial to the defendant. The State of Louisiana took writs, the Supreme Court denied those writs and I can't anticipate their reasons or anything else, except to say as the proper vehicles there, that was a matter under our law at that time that they considered, I would assume, that was within the discretion of the Trial Judge and if it had been the law of our State, that the ruling of the Trial Judge in view of the jury's finding, I think that those writs would have been granted immediately because if that was the view point that would have ended the matter of the Trial Judge. It was just another vehicle in our way of procedure at that time and a new trial was granted in this matter as this record will reflect. A jury returned a verdict of guilty and an application for a new trial was made [3] and denied, the case was appealed to the Supreme Court and affirmed by the Supreme Court. The Burks case and the reference therein was a Federal Case and it was dealing with a Federal Appellant Court's decision as to the burden of proof that the Appellant Court found the State did not hear once the particular defense had been raised in that case. It is pointed out in Burks that there was no appeal of the Appellant Courts ruling. In Burks then, we weren't exactly dealing with two trials, we were dealing with one trial that has been appealed and an attempt to try another one. This case has gone through the Courts, new trial granted and that trial has been completed. The trial was conducted, a new trial was granted, rulings made and the trial was conducted under the laws then existent of our State and for these reasons I am going to deny the writ. I am going to

deny the application. Now you want to take--I'm going to give you, pursuant to our conference inasmuch as the defendant will be agreived by this decision there is fifteen days to apply for writs as to the Court's denial of this motion.

MR. PHILLIPS: If it please the Court, we will at this time give the Court verbal notice of intention to apply to the Louisiana State Supreme Court for supervisory writs and I believe the Court has fixed the delay of fifteen days.

THE COURT: Right, the record will reveal your notice of intention to apply for writs and the Court will grant you fifteen days in which to perfect those writs.

MR. PHILLIPS: Thank you sir.

[4] **REPORTER'S CERTIFICATE** (omitted in printing)

**SUPREME COURT**
**STATE OF LOUISIANA**

STATE OF LOUISIANA

*v.*

TRACY LEE HUDSON

---

NUMBER 54,929 ON THE CRIMINAL DOCKET OF THE TWENTY-SIXTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF BOSSIER, STATE OF LOUISIANA, HONORABLE CECIL C. LOWE, JUDGE

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**APPLICATION FOR**
**WRIT OF CERTIORARI ON WRIT OF HABEAS CORPUS**

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TO THE HONORABLE, THE SUPREME COURT OF THE STATE OF LOUISIANA:

**STATEMENT OF THE CASE**

On January 4, 1977, petitioner, Tracy Lee Hudson, hereinafter referred to as "petitioner", was charged with First Degree Murder in the District Court in and for the Twenty-Sixth Judicial District, Parish of Bossier, State of Louisiana, Criminal Docket Number 54,929; on March 2, 1977, petitioner was found guilty; on March 7, 1977, the Honorable Enos C. McClendon granted a new trial on the grounds that the evidence presented by the state was insufficient to sustain the verdict of guilty. The Supreme Court of Louisiana upheld that decision. *State* v. *Hudson*, Louisiana, 344 So. 2d, 1 (1977).

Petitioner was retried and was found guilty on September 30, 1977; on June 19, 1978, the Supreme Court of

Louisiana issued an Opinion, Case Number 61385, affirming the conviction; on August 31, 1978, rehearing was refused. On June 14, 1978, while petitioner's appeal was pending in this court, the Supreme Court of the United States held in *Burks* v. *United States*, 98 S. Ct. 2141 (1978) that as a matter of substantive constitutional law, the double jeopardy clause of the Fifth Amendment to the United States Constitution *prohibits* the retrial of a defendant when his original trial resulted in a decision that the evidence adduced therein was legally insufficient to sustain a conviction.

On October 2, 1978, petitioner filed an Application for Writ of Habeas Corpus, alleging the illegality of his second trial on the grounds that it constituted a violation of the double jeopardy prohibition of the Fifth Amendment to the Constitution of the United States.

After hearing, before Honorable Cecil C. Lowe, Judge, Twenty-Sixth Judicial District Court, Bossier Parish, Louisiana, petitioner's application for writ of habeas corpus was denied.

**GROUNDS FOR SUPERVISORY JURISDICTION**

Jurisdiction vests under the provisions of Article 5, Section 5 of the Constitution of the State of Louisiana, granting the Supreme Court of Louisiana control of, and general supervisory jurisdiction over, all inferior courts; Rule 10, Section 5 of the Louisiana Supreme Court Rules; and Article 369 of the Louisiana Code of Criminal Procedure. For the reasons herein stated, this Honorable Court should exercise its jurisdiction.

The ruling or judgment of the Honorable Cecil C. Lowe, Judge, of the Twenty-Sixth Judicial District Court, Bossier Parish, Louisiana, to-wit:

Denial of petitioner's release on the Writ of Habeas Corpus was a final judgment herein, but is not appealable under C. Cr. P. Art. 369.

## THE ISSUES

1. Sustaining of motion for new trial on insufficiency of evidence is bar to further prosecution for same offense under Fifth Amendment double jeopardy clause.

2. Failure to plead former jeopardy prior to second trial is not waiver since, one, a plea of double jeopardy may be raised at any time, and, two, the plea would have been of no avail under then existing Louisiana law.

## ASSIGNMENT OF ERROR

The Court erred in failing to find that the second trial of petitioner, Tracy Hudson, violated the double jeopardy clause of the Fifth Amendment of the United States Constitution.

## ARGUMENT

**Sustaining of Motion for new trial on insufficiency of evidence is bar to further prosecution for same offense under Fifth Amendment Double Jeopardy clause.**

The United States Supreme Court in *Burks* v. *United States*, 437 U.S. ___, 98 S. Cit. 2141, ___ L. Ed. 2d, ___ (1978) clearly stated:

> "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks*, 2147

In the case at bar, the essential testimony supplied in the second trial that was not present in the first was the testimony of an eyewitness who stated that he had told the policeman at the scene that he had observed the crime; but his name got lost for about ten months until the second trial (Second Trial Tr., p. 215). Although there are many unanswered questions concerning the obtaining of this missing eyewitness, such unanswered questions are not germane to this petition; what is germane is that the state had an opportunity to present this testimony in violation of the petitioner's Fifth Amendment privilege against being twice placed in jeopardy for the same offense; hence,

the State of Louisiana was afforded ". . . another opportunity to supply evidence which it failed to muster in the first procedure." *Burks*, supra 2147.

The discussion of the *Burks* decision thus far is preliminary and certainly not new to this Honorable Court; that is, that a man cannot be twice placed in jeopardy; however, the holding of the *Burks* decision which is most pertinent to the instant case and which most significantly changes the application of the Fifth Amendment Double Jeopardy Clause is that once a reviewing court has found the evidence legally insufficient, the Double Jeopardy Clause *precludes a second trial*, and the fact that a defendant has made a motion for a new trial is not a waiver. The Supreme Court in *Burks*, at page 2150, stated:

> "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person "waives" his right to a judgment of acquittal by moving for a new trial . . . Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only "just" remedy available for that court is the direction of a judgment of acquittal. *To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled.* (Emphasis added.)

Likewise, it must be recognized that *Burks* renders inoperative and unconstitutional that portion of La. Code Crim. Pro. Ann., Art. 591, which is emphasized as follows:

> No person shall be twice put in jeopardy of life or liberty for the same offense, *except, when on his own motion, a new trial has been granted* . . .

It is clear, that while the unemphasized portion of the statute is no more than a statement of the Constitutional Double Jeopardy Clause, the emphasized portion cannot withstand the holding of *Burks*, supra, 2150. That is, it cannot be meaningfully said that a person waives his constitutional right against being twice placed in jeopardy for

the same offense by asking the court for relief from a finding of guilt on legally insufficient evidence, even if the legal vehicle for such relief is termed a motion for new trial.

The Supreme Court in *Burks* reviewed the prior decisions of the Court that led to the misconception that a retrial could be granted upon a finding of insufficient evidence. The Court thereon stated that the prior cases:

> ". . . generally do not distinguish between reversals due to trial error and those resulting from evidentiary insufficiency. We believe, however, that the failure to make this distinction has contributed substantially to the present state of conceptual confusion existing in this area of the law." *Burks*, 2149.

The Court then went on to state:

> "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g. incorrect receipt of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a voted concern for insuring that the guilty are punished. . .
>
> *The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble.* Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been submitted to the jury. *Since we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on*

> *review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.*" (Emphasis added.) *Burks, supra,* 2149 and 2150.

In the case at bar, under the legal vehicle of a Motion for New Trial, the trial court reviewed the evidence and made a finding that:

> "In the present case, I heard the same evidence the jury did, I'm convinced that there was *no evidence, certainly not evidence beyond a reasonable doubt,* to sustain the verdict of homicide committed by the defendant of this particular victim. (Motion for New Trial Tr. page 12, lines 20–25. Emphasis added).

This finding on review by the trial court is unmistakably and clearly based on legally insufficient evidence as distinguished from trial error, and as such, retrial is barred by the Double Jeopardy Clause of the United States Constitution and the second trial of petitioner for the same offense is a nullity.

There are, at first view, several factors distinguishing *Burks* from the case at bar: (1) in Burks, the holding of insufficient evidence occurs at the appellate level; (2) Burks is a Federal Case; and (3) in Burks, the Government's evidence rebutting the defendant's affirmative defense is found insufficient, not the evidence of the crime.

A discussion of each of these distinguishing factors is in order here:

*First,* in the *Burks* case, the defendant was found guilty by the jury as charged by the state. "Thereafter, he filed a timely motion for a new trial, maintaining among other things 'that the evidence was insufficient to support the verdict'". *Burks, supra,* 2143. This motion was denied by the District Court. However, the Court of Appeals agreed with *Burks* claim that the evidence was insufficient to support the verdict and reversed the conviction. In the case at bar, the jury returned a verdict of guilty as charged. The petitioner filed a timely Motion for New Trial, maintaining among other things that the verdict was contrary to the evidence. On review by the trial judge, this motion was granted. The State of Louisiana appealed

the trial court's finding of insufficient evidence to the Louisiana Supreme Court; that Court upheld the trial judge's decision. *State* v. *Hudson*, Louisiana, 344 So. 2d, 1 (1977).

In each case, the state had rested, and the jury had returned its verdict. It cannot be contended, in either case, that at the hearing on the Motion for New Trial, the state could have reopened its case for new evidence—the jury had been sworn to try the cause and discharged. Jeopardy had definitely attached. See *State* v. *Daigle*, Louisiana, 344 So. 2d, 1380; *Crist* v. *Bretz*, 437 U.S. ___, 98 S. Ct. 2156, 57 L. Ed. 2d, ___ (1978). The exclusive conclusion is that in either instance, whether the evidence were found legally insufficient on review by the trial judge at the motion for new trial or on review by the appellate court, the result is that in order to afford the State a chance to muster new evidence, a *re*trial of the same defendant for the same offense is required—such a *re*trial is prohibited by the Fifth Amendment Double Jeopardy Clause.

Can it logically be said that a case *can* be retried when a motion for new trial is sustained by reason of legally insufficient evidence; but *cannot* be retried when an appellate court rules that the motion for new trial should have been sustained for the same reason?

The *second* possible distinguishing factor that *Burks* is a Federal case is of no avail; if one were merely applying federal *procedural* law, *Burks* would have no application to the instant case; however, the *Burks* holding is of *substantive U.S. Constitutional Law, clearly binding on the States* through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d, 707 (1969). See also the recent case of *Crist* v. *Bretz*, *supra*, which goes so far as to hold that the rule that jeopardy attaches when the jury is empaneled and sworn is applicable to the states.

The *third* possible distinguishing factor is the factual difference between *Burks* and the instant case. Admittedly, the *Burks* decision is made on what appears to be an erroneous finding of legally insufficient evidence; how-

ever, the U.S. Supreme Court resolves that issue by simply stating that the United States failed to cross-petition on the question of whether or not the Court of Appeals was correct in its holding of legally insufficient evidence. The Court then states:

> "Accordingly, that issue is not open for review here. Given this posture, we are squarely presented with the question of whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury." *Burks, supra*, 2144.

Hence, if the factual difference is of any consequence, it is favorable to the petitioner herein; inasmuch as by comparison, in *Burks* the holding of insufficient evidence is possibly erroneous, but was not appealed by the United States; however, in the instant case, the holding of insufficient evidence is clear, was appealed by the State and was upheld by the Louisiana Supreme Court.

It should be noted also, that the *only* relief afforded a defendant who has been convicted by a jury on legally insufficient evidence, is to apply for a new trial. Since the Amendment to the Louisiana Code of Criminal Procedure, Article 778, eliminated Motions for a Directed Verdict or Motions for Acquittal in jury cases, the Louisiana Law provides no procedural vehicle for presenting the question of legally insufficient evidence to the court, except by a motion for a new trial *after* conviction. This type of forced waiver of double jeopardy rights is exactly what was held unconstitutional in the *Burks* decision.

**Failure to Plead Former Jeopardy Prior to Second Trial is not Waiver: Since, One, a Plea of Double Jeopardy may be raised at Any Time; and, Two, The Plea Would Have Been of No Avail Under Then Existing Louisiana Law.**

Petitioner's plea of double jeopardy is timely raised by the instant Writ of Habeas Corpus since double jeopardy may be raised at any time under Louisiana Law. La. Code Crim. Pro. Ann., Art. 594; *State* v. *Smith*, Louisiana, 323 So. 2d, 797 (1975). La. Code Crim Pro. Ann., Art. 362 (6).

Moreover, the U.S. Supreme Court has held that failure

to object to a practice which a state had long allowed cannot strip a defendant of his right to attack the practice following invalidation by the Supreme Court. See *O'Connor* v. *Ohio*, 385 U.S. 92, 87 S. Ct. 252, 17 L. Ed 2d, 189 (1966). Specifically, the U.S. Supreme Court in *Griffin* v. *California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d, 106 (1965), held it error for the court to instruct on or for the prosecuting attorney to comment on a defendant's failure to testify. At the time of the *Griffin* ruling the constitutions of California and of Ohio required an instruction that the defendant did not have to testify and that failure to do so could not be held against him. O'Connor had failed to object to the prosecutor's comment on O'Connor's failure to testify because at the time of trial, the prosecutor's comment was permitted by Ohio law. O'Connor had exhausted his appeals in the Ohio courts and was seeking direct review at the U.S. Supreme Court when the *Griffin* case was handed down. The U.S. Supreme Court thus reasoned in O'Connor, at 191, that ". . .failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." and the Court therein stated: "We hold that in these circumstances, the failure to object in the state courts cannot bar the petitioner from asserting his federal right."

In the *Griffin* and *O'Connor* cases, the Court was addressing the Fifth Amendment privilege against self-incrimination; in the *Burks* case, the Court addresses the Fifth Amendment privilege against being twice placed in jeopardy for the same offense. Prior to *Griffin* and *O'Connor*, it had long been the practice of Ohio to allow prosecutor comment on the defendant's failure to testify; prior to Burks, it has long been the practice of Louisiana and other states to allow the State a second chance to muster sufficient evidence in a retrial if the defendant had successfully moved for a new trial by reason of insufficient evidence. Thus petitioner's failure to plead former jeopardy prior to his second trial in this cause should not strip him of his right to raise double jeopardy in this Writ of Habeas Corpus.

It should be further noted that even if prospective, application is given the holding in *Burks* as it was given the holding in *Griffin*, the petitioner herein is still not barred since the *Burks* decision was handed down while petitioner was seeking appellate review before the Supreme Court of Louisiana, and, hence, his case had not become final.

## CONCLUSION

Petitioner, Tracy Lee Hudson, timely presented to the District Court the only remedy available to him at the conclusion of his first trial, raising the issue of the legal insufficiency of the State's evidence. The District Court held specifically that the evidence was insufficient to sustain a conviction. Petitioner, Tracy Lee Hudson, was subsequently for the second time placed in jeopardy for exactly the same offense. According to the clear and unambiguous decision of the U.S. Supreme Court in *Burks, supra*, as a matter of *substantive constitutional law*, petitioner's second trial was in direct violation of the prohibition against double jeopardy in the Fifth Amendment to the Constitution of the United States.

Petitioner's original Motion for a New Trial following his first trial, did not waive his right to plead double jeopardy, and petitioner's plea of double jeopardy by the instant Writ of Habeas Corpus was timely presented under Louisiana Law and under the U.S. Supreme Court decisions.

It is respectfully submitted that the petitioner's second trial was a nullity and petitioner's release from custody resulting therefrom must be ordered forthwith.

Respectfully Submitted,

TWENTY-SIXTH JUDICIAL DISTRICT INDIGENT DEFENDER OFFICE

S. PATRICK PHILLIPS
*Chief Assistant Indigent Defender*
*405 Bossier Parish Courthouse*
*Benton, Louisiana 71006*

**PRAYER**

WHEREFORE, PETITIONER PRAYS that writs of certiorari be granted in this cause; that this Court will bring the record up, and that after due proceedings had, order the release of petitioner, Tracy Lee Hudson.

STATE OF LOUISIANA
PARISH OF BOSSIER

**VERIFICATION**

BEFORE ME, the undersigned authority, a Notary Public duly commissioned and qualified in accordance with law in and for the State and Parish aforesaid, personally came and appeared: S. PATRICK PHILLIPS, Chief Assistant Indigent Defender, Twenty-Sixth Judicial District Indigent Defender Board, who, after having been first duly sworn, deposed and stated that:

1. He is of counsel for petitioner in these proceedings;
2. All of the allegations contained in the above and foregoing application for Writs are true and correct to the best of his knowledge, information and belief;
3. A copy of this application has been served on the Honorable Cecil C. Lowe, Judge of the Twenty-Sixth Judicial District Court of Louisiana, and on Honorable District Attorney, Henry N. Brown, Jr., in and for the Twenty-Sixth Judicial District of Louisiana, prior to filing of same in the Supreme Court of Louisiana, by personally handing each of them a copy hereof;
4. All of the documents attached hereto and filed herewith are true and correct copies of the original documents filed in the record herein.

S. PATRICK PHILLIPS
*Chief Assistant Indigent Defender*

SWORN AND SUBSCRIBED before me, Notary, this 16th day of November, 1978.

RUTH V. STRONG
*Notary Public*

**SUPREME COURT OF LOUISIANA**

No. 63,450

STATE OF LOUISIANA

*v.*

TRACY LEE HUDSON

**ON WRIT OF CERTIORARI TO THE TWENTY-SIXTH JUDICIAL DISTRICT COURT, PARISH OF BOSSIER, HONORABLE CECIL C. LOWE, JUDGE.**

* * * * *

BLANCHE, Justice.

The issue presented is whether the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's guilty verdict has been set aside and a new trial ordered pursuant to LSA-C.Cr.P. art. 851 solely for lack of sufficient evidence to sustain the jury's verdict.

Petitioner, Tracy Lee Hudson, was convicted by a jury of first degree murder, LSA-R.S. 14:30, and sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. Pursuant to his duty to pass upon the sufficiency of the evidence, *State v. Daspit*, 167 La. 53, 118 So.690 (1928); LSA-C.Cr.P. art. 851, Official Revision Comment (d); the trial judge granted petitioner's motion for a new trial upon finding insufficient evidence to support the verdict returned by the jury.[1] The granting or the refusal to grant a new trial is unreviewable by this Court, except for error of law. LSA-C.Cr.P. art. 858. Accordingly, the State's application for review erroneously asserting that the district court may pass only upon whether there is "some evidence" was denied. 344 So.2d 1 (La. 1977) Upon retrial the State introduced additional evidence, in particular an eye witness to the murder

---

[1] In his Oral Reasons for Judgment, the trial judge stated:

> "In the present case, I heard the same evidence the jury did, I'm convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of homicide committed by the defendant of this particular victim."

who had not been produced at the original trial. The petitioner was convicted by a jury of first degree murder for the second time and resentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. On appeal, the conviction and sentence were affirmed. 361 So.2d 858 (La. 1978)

On October 2, 1978, petitioner applied for habeas corpus relief in the district court, alleging for the first time that the second trial in this case placed him in jeopardy a second time for the same offense in violation of the double jeopardy clause of the Fifth Amendment. The trial court denied relief, and petitioner applied to this Court. We granted petitioner's application to consider his plea of double jeopardy.

In *Burks v. United States*, ___ U.S. ___, 98 S.Ct. 2141, 57 L.Ed2d 1 (1978), the United States Supreme Court announced that the double jeopardy clause of the Fifth Amendment precluded a second trial when a defendant's conviction is reversed by a reviewing court solely for lack of sufficient evidence to sustain the jury's verdict. In *Burks*, the defendant was convicted of bank robbery in federal district court and the trial judge denied his motion for new trial. On appeal, the defendant claimed that he had successfully established a prima facie defense of insanity through the testimony of three expert witnesses and the Government had failed to meet its burden of coming forward and proving sanity beyond a reasonable doubt. The Supreme Court observed:

> ". . . [T]he reviewing court went on to hold that the United States had not fulfilled its burden since the prosecution's evidence with respect to Burks' mental condition, even when viewed in the light most favorable to the Government, did not "effectively rebut' petitioner's proof with respect to insanity and criminal responsibility. In particular, *the witnesses presented by the prosectution failed to 'express definite opinions on the precise questions which this court* [of appeals] has identified as critical in cases involving the issue of [in]sanity.' " (98 S.Ct. at 2143—Emphasis added)

The court of appeal remanded the case to the district court, directing that court to enter a verdict of acquittal unless the State was able to present sufficient additional evidence to carry its burden. The defendant sought relief on double jeopardy grounds.

The Supreme Court in *Burks* held that a second trial would normally be permitted after a conviction had been reversed due to trial error, but that the double jeopardy clause prohibited a second trial after a conviction had been reversed due to failure of proof. The Court explained the rationale for this distinction as follows:

> ". . . In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. See Note Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 31 U.Chi.L. Rev. 365, 370 (1964).
>
> "The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. . . . Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." (98 S.Ct. at 2149-2150)

In precluding a second trial when a defendant's conviction has been overturned due to failure of proof at trial, the high court expressly declined to follow prior jurisprudence which found a "waiver" of the double jeopardy guarantee whenever the defendant sought a new trial as one of his remedies in the trial court:

> "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial. . . . To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled." (98 S.Ct. at 2150)

The double jeopardy protection of the Fifth Amendment is applicable to state criminal proceedings through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed2d 707 (1969); *State v. Thompson*, 366 So.2d 1291 (La. 1978).

While the case at bar involves the granting of a motion for new trial by the trial court for insufficient evidence rather than review at the appellate level, we deem the same principles are applicable to both.

LSA-C.Cr.P. art. 851 provides:

> "The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> "The court, on motion of the defendant, shall grant a new trial whenever:
>
> "(1) The verdict is contrary to the law and the evidence . . . ."

This provision permits the trial judge to grant a defendant a new trial if, in his opinion, the evidence is insufficient to convict. *State v. Rollins*, 351 So.2d 470 (La. 1977); *State v. Jack*, 332 So.2d 464 (La. 1976); *State v. Jones*, 288 So.2d 48 (La. 1974). This Court's appellate jurisdiction in

criminal matters extends only to questions of law, LSA-Const. Art. 5, § 5 (c), and it is only where a defendant has moved for a judgment of acquittal in a trial before a judge alone (LSA-C.Cr.P. art. 778) or for a new trial based upon the contention that there is *no evidence at all* of the crime charged or an essential element thereof, is a question of law presented which this Court can review. *State v. Cobbs*, 350 So.2d 168 (La.1977); *State v. Blacksline*, 347 So.2d 193 (La.1977); *State v. Jamerson*, 341 So.2d 1118 (La.1977).

This Court has recognized that when it finds on review that in a prior trial there was *no evidence* of the crime charged or an essential element thereof, *Burks* precludes retrial, and a verdict of acquittal must be entered. *State v. Thompson*, 366 So.2d 1291 (La.1978); *State v. Allien*, 366 So.2d 1308 (La.1978); State v. Liggett, 363 So.2d 1184 (La.1978). In *State v. Thompson, supra*, we noted that the Supreme Court indicated that the contention that there was *no evidence* of the crime charged or an essential element thereof may properly be raised solely by a motion for new trial. *State v. Thompson, supra* at 1293-94. Thus, if a trial judge granted a motion for new trial on the grounds that *no evidence* of the crime charged or an essential element thereof, *Burks, supra*, and our holding in *Thompson, supra*, would require the trial judge to enter a verdict of acquittal.

The question in the instant case is whether *Burks* compels the same result where the trial judge grants a motion for new trial on the grounds of *insufficient evidence* as opposed to granting the motion on the grounds of *no evidence*. We believe it does not.

We believe the holding in *Burks* was addressed solely to those cases where a reviewing court (whether it be the trial judge or an appellate court) finds that as a *matter* of *law* there was a failure of proof at the trial level. The Court, in *Burks*, explained:

> "The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosectution cannot com-

> plain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. . . . *Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been submitted to the jury.*" (98 S.Ct. at 2149–2150—Emphasis added)

Interpreting this language in light of this State's rules regarding appellate review of evidence presented in criminal matters, we believe the holding in *Burks* (precluding a second trial) is limited to those cases where, *as a matter of law*, a reviewing court has determined that in a prior trial there was *no evidence* of the crime charged or an essential element thereof.

We are buttressed in this conclusion by what we feel was an attempt by the Court to narrow its holding in *Burks:*

> ". . . The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury finding the defendant guilty beyond a reasonable doubt. [Citations omitted] . . . While this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, it is apparent that such a decision will be confined to cases where the prosecution's failure is clear. . . ." (98 S.Ct. at 2150)

Because the trial judge herein ordered a new trial pursuant to LSA-C.Cr.P. art. 851 (1) solely for lack of *sufficient evidence* to sustain the jury's verdict (a factual determination entrusted exclusively to the trial judge under our law and jurisprudence), we hold that retrial of the defendant was not precluded by the double jeopardy clause.

**DECREE**

For the above and foregoing reasons, the judgment of the district court denying relator relief on his habeas corpus application is affirmed.

AFFIRMED.

**SUPREME COURT OF LOUISIANA**

No. 63,450

STATE OF LOUISIANA

*v.*

TRACY LEE HUDSON

* * * * *

**CONCURRING OPTION**

TATE, Justice.

I fully concur in the holding of the majority.

Although Burks v. United States, ___ U.S. ___, 98 S.Ct. 2141 (1978), has language that without close analysis seems to require upholding the double jeopardy plea, in my opinion the majority has correctly concluded that its rationale and holding are not applicable to the present situation.

Here, the record of the first trial shows that the state produced evidence sufficient to present the jury the question of the defendant's guilt of the crime. We would not have held, on appeal, that the evidence in that record was so insufficient as to constitute no evidence of the crime, so as to justify our setting aside the verdict of guilty.

Nevertheless, the trial judge was not completely satisfied that the accused's guilt was proved beyond a reasonable doubt. He did *not* grant a new trial for a reason that he did not think the state had produced *sufficient* evidence to prove guilt, but rather because he himself (to satisfy *his* doubts—not the jury's which had concluded otherwise) had personal doubts that the evidence was sufficient to prove guilt beyond a reasonable doubt. Commendably and conscientiously, he therefore ordered a new trial; otherwise, the sufficiency of the evidence would not have been reviewable by this court, despite his own doubts that the defendant's guilt was sufficiently proved.

The present is not an instance where the state did not prove its case at the first trial, so that granting a new trial gave the state a *second* chance to produce enough evi-

dence to convict the accused. If so, as the majority notes, re-trial offends constitutional double jeopardy.

Rather, this is an instance where the state produced enough evidence to convict the accused at the first trial, but nevertheless the conscientious trial judge was troubled by a doubt concerning the defendant's actual guilt. In ordering the new trial, he did so to protect the accused (his denial of the new trial would have been unreviewable under our jurisprudence, since "some" evidence sufficient to support a verdict of guilt had been introduced).

In reality, the trial judge's reason for granting the new trial is better expressed by his authorization to do so whenever "the court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right," La.C.Cr.P. art. 851(5). Under these circumstances, I do not believe that *Burks* requires us to hold that double jeopardy is occasioned by a new trial granted for such reason.

I therefore respectfully concur.

## SUPREME COURT OF LOUISIANA

No. 63,450

STATE OF LOUISIANA

*v.*

TRACY LEE HUDSON

DENNIS, Justice, dissenting.

I respectfully dissent.

Although the Supreme Court in Burks v. United States, ___ U.S. ___, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) was not confronted with a case in the exact posture as the instant proceeding it is clear that the constitutional principles expounded there are applicable here. The high court flatly stated that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Id., 98 S.Ct. at 2147, 57 L.Ed.2d at 9. The Court's opinion provides no basis for limiting its holding to cases in which a reviewing court has set aside a conviction for evidentiary insufficiency. On the contrary, the Court supported its decision by pointing out that reversal for insufficient evidence should be treated the same whether made by the trial court or the reviewing court:

> "[I]t should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient . . . . To hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court." *Id.*, 98 S.Ct. at 2147, 57 L.Ed.2d at 9.

Moreover, in a companion case, United States v. Scott, ___ U.S. ___, 98 S.Ct. 2187, 2196–97, 57 L.Ed.2d 65, 77–78 (1978), the Supreme Court made it clear that the question of whether a trial court's ruling is to be treated as an acquittal for purposes of double jeopardy is not to be determined by the judge's own characterization of his ac-

tion. The Court in *Scott* relied on United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), in which the Court made the following statement:

> "[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action. [citations omitted] Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."

Therefore, as I read *Burks*, *Scott* and *Martin Linen*, the double jeopardy clause has now been interpreted so as to prohibit a reprosecution of a defendant after a determination, by either a trial or appellate court, that the evidence introduced at trial was insufficient to sustain the verdict, regardless of the label placed on the motion and ruling by the defendant or the trial judge.

Additional support for this view may be found in the following language quoted with approval in the recent United States Supreme Court decision in Greene v. Massey, ___U.S.___, 98 S.Ct.___, 57 L.Ed.2d 15, 20 (1978):

> " 'Regardless of whether an appellate court or a trial jury makes the determination that the evidence is insufficient to sustain a finding of guilt as to a particular charge, and regardless of whether a petitioner moves for a new trial on other grounds in addition to asserting the ground of insufficiency of the evidence, it would seem that the double jeopardy clause would preclude giving the prosecution a second chance.' "

There appears to be no better reason for allowing the prosecution to retry such a case as the present one than there is to allow the prosecution, for example, to retry a defendant after discharging the jury upon discovering that it has insufficient evidence because of the absence of witnesses. *See* Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1965); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931).

Although it is not stated explicitly in any of the Supreme Court's recent opinions, their total effect appar-

ently eliminates the possibility that a defendant may merely be granted a new trial upon a finding of evidentiary insufficiency and requires that a judgment of acquittal be entered instead. This result appears, moreover, to be consistent with the purpose underlying the prohibition against double jeopardy, as stated, for example, by the Supreme Court in Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Id., 355 U.S. 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199.

For the foregoing reasons, defendant's conviction should be reversed and set aside and the defendant ordered discharged.

**SUPREME COURT STATE OF LOUISIANA**

**No. 63,450**

STATE OF LOUISIANA

*v.*

TRACY LEE HUDSON

**APPLICATION FOR REHEARING**

NOW INTO COURT through undersigned counsel comes and appears TRACY LEE HUDSON, who with respect represents:

1.

Tracy Lee Hudson filed a Writ of Habeas Corpus alleging Double Jeopardy, which application was denied by the 26th Judicial District Court.

2.

This Court granted Writs of Certiorari; and after hearing, affirmed the lower Court's decision.

3.

This Court found as a fact, in its opinion, that following defendant's original conviction of first degree murder, "the trial Judge granted petitioner's motion for a new trial upon finding *insufficient evidence to support the verdict returned by the jury*" (emphasis added).

4.

Quoting *Burks vs. U.S. 98 S.Ct. 2141 (1978)*, this Court recognized the U.S. Constitution principle enunciated therein as follows: "The Fifth Amendment precluded a second trial when a defendant's conviction is reversed by a reviewing Court solely for *lack of sufficient evidence to sustain the jury's verdict.* (emphasis added).

5.

This Court then held that "in light of this State's rules regarding appellate review of evidence presented in criminal matters;" that the *Burks* case was not applicable.

6.

This Court reached this conclusion notwithstanding the specific and unequivocal holding of the trial Court as follows: "I'm convinced that there was *no evidence* . . . to sustain the verdict of homicide committed by the defendant of this particular victim."

7.

The decision of this Court of June 25, 1979 does violence to the U.S. Constitutional rights guaranteed petitioner by the Fifth Amendment to the U.S. Constitution as enunciated in *Burks*.

8.

Petitioner submits that the Court's opinion of June 25, 1979 is neither legally sound nor logically consistent, and respectfully requests that a rehearing be granted herein.

9.

Counsel for petitioner was engaged in a criminal jury trial during June 25, 1979 through June 29, 1979, inclusive, and has not had sufficient time to prepare an adequate brief herein.

10.

This Court's decision of June 25, 1979 was based on an issue not anticipated as material by either the State or the defense herein, and was not adequately briefed on the original hearing herein.

11.

Petitioner desires an additional thirty (30) days within which to file a brief in support of this application for rehearing.

WHEREFORE PETITIONER PRAYS that he be granted an additional thirty (30) days from this date to file a brief in support of the application for rehearing, and that he be granted a rehearing on his application for Writs of Habeas Corpus.

S. PATRICK PHILLIPS
*Chief Asst. Indigent Defender*
*405 Bossier Parish Court House*
*Benton, Louisiana*

**CERTIFICATE OF SERVICE** (omitted in printing)

SUPREME COURT OF LOUISIANA

---

No. 63,450

STATE OF LOUISIANA

*vs*

TRACY LEE HUDSON

---

ON WRIT OF CERTIORARI TO THE
TWENTY-SIXTH JUDICIAL DISTRICT COURT
PARISH OF BOSSIER
HONORABLE CECIL C. LOWE, JUDGE

On Application for Rehearing

Denied.

FWS
AT JR
WFM
FAB

Dixon, Calogero and Denis J.J., would grant a rehearing.

# Supreme Court of the United States

No. 79-5688

TRACY LEE HUDSON,

*Petitioner,*

*v.*

LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Louisiana.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 14, 1980

☆U.S. GOVERNMENT PRINTING OFFICE 1980 321615 5

(3)

TRACY LEE HUDSON
Petitioner

VERSUS

NUMBER: 79-5688

STATE OF LOUISIANA
Respondent

Supreme Court, U.S.
FILED
FEB 11 1980
MICHAEL RODAK, JR., CLERK

ANSWER TO PETITION FOR WRIT OF CERTIORARI
TO REVIEW A JUDGMENT OF THE LOUISIANA SUPREME COURT

NOW INTO COURT comes the State of Louisiana, through the undersigned District Attorney for the Twenty-Sixth Judicial District, who answers the Petition for Writ of Certiorari to Review a Judgment of the Louisiana Supreme Court as follows:

1.

On March 3, 1977, Tracy Lee Hudson was tried before a jury of twelve and by unanimous verdict was convicted of first degree murder. On March 7, 1977, the presiding judge granted the defendant, pursuant to the laws of the State of Louisiana, a new trial. The presiding judge, in granting the defendant a new trial, clearly stated that he was granting the new trial, not because the defendant was entitled to a new trial as a matter of strict legal right, but because in the opinion of the trial judge the ends of justice would be better served by the granting of a new trial.

Under the Louisiana law, the trial judge has the right to grant a new trial if he feels the ends of justice would be better served by doing so and this granting of a new trial is not reviewable by the Louisiana Supreme Court. Louisiana Code of Criminal Procedure, Article 851(5). It should be noted that the trial judge granted the defendant a new trial and not an acquittal.

On September 30, 1977, the defendant was once more tried for the crime of first degree murder and once more a jury of twelve unanimously convicted him of murder. This conviction was appealed to the Louisiana Supreme Court and affirmed with a rehearing being denied on August 31, 1978. 361 So.2d 858

On October 2, 1978, petitioner filed for Habeas Corpus relief in the Twenty-Sixth Judicial District Court for the State of Louisiana alleging for the first time that the second trial [illegible] jeopardy in violation of the

SUPREME COURT OF THE UNITED STATES

TRACY LEE HUDSON
Petitioner

VERSUS NUMBER: 79-5688

STATE OF LOUISIANA
Respondent

Supreme Court, U.S.
FILED
FEB 11 1980
MICHAEL RODAK, JR., CLERK

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On March 3, 1977, Tracy Lee Hudson was tried before a jury of twelve and by unanimous verdict was convicted of first degree murder. On March 7, 1977, the presiding judge granted the defendant, pursuant to the laws of the State of Louisiana, a new trial. The presiding judge, in granting the defendant a new trial, clearly stated that he was granting the new trial, not because the defendant was entitled to a new trial as a matter of strict legal right, but because in the opinion of the trial judge the ends of justice would be better served by the granting of a new trial.

Under the Louisiana law, the trial judge has the right to grant a new trial if he feels the ends of justice would be better served by doing so and this granting of a new trial is not reviewable by the Louisiana Supreme Court. Louisiana Code of Criminal Procedure, Article 851(5). It should be noted that the trial judge granted the defendant a new trial and not an acquittal.

On September 30, 1977, the defendant was once more tried for the crime of first degree murder and once more a jury of twelve unanimously convicted him of murder. This conviction was appealed to the Louisiana Supreme Court and affirmed with a rehearing being denied on August 31, 1978. 361 So.2d 858

On October 2, 1978, petitioner filed for Habeas Corpus relief in the Twenty-Sixth Judicial District Court for the State of Louisiana alleging for the first time that the second trial in this case placed him in jeopardy in violation of the double jeopardy clause of the Fifth Amendment. The trial court denied this relief and petitioner appealed to the Louisiana Supreme

Court. The Louisiana Supreme Court denied his relief and clearly considered the case of Burks vs. United States 98 S.Ct. 2141, 51 L.Ed 2d 1. In its denial of the Habeas Corpus relief sought by Tracy Hudson, the Louisiana Supreme Court stated that the trial court was not finding the lack of evidence for conviction at the first trial. In other words, the trial court did not find no evidence which would have warranted a conviction and the Louisiana Supreme Court pointed out that if the case had been appealed it would have found sufficient evidence to have warranted conviction. The Louisiana Supreme Court found that the trial judge simply felt that in the ends of justice and his conscious, a new trial should be granted even though legally the defendant was not entitled to such. Therefore, the Louisiana Supreme Court found that the case of Burks was not applicable in this situation.

2.

Louisiana Code of Criminal Procedure, Article 851(5) states that the trial judge, on the motion of the defendant, shall grant a new trial whenever:

> "The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right."

The concurring opinion of Justice Tate, as well as the majority opinion, clearly sets forth that the trial judge, at the first conviction of the defendant, Tracy Hudson, was simply indicating that he felt a new trial should be granted to meet the ends of justice and not because there was no evidence whatsoever of the defendant's guilt or that the defendant was entitled to an acquittal. It is clear that the trial judge ordered a new trial and not a dismissal of the charges.

3.

It is respectfully submitted that this Honorable Court should accept the factual determination by the Louisiana Supreme Court and find that the rational set forth in Burks has no application to this case arising under the Louisiana Substantive and Procedural Laws. Alternatively, this Honorable Court should refuse to grant Writs of Certiorari and allow the procedures to progress through the lower Federal Courts in order that an evidentiary hearing can be conducted if this court has any doubt to the reasoning of the trial judge.

## CONCLUSION

The defendant, Tracy Hudson, was tried twice and convicted twice and a grave injustice would be done if he was now released from custody. The trial judge had no intention of finding that no evidence existed of Tracy Hudson's guilt after the first trial but simply felt

that he should be given a second chance or a second trial. The Louisiana Supreme Court made it clear that the trial judge had no legal obligation to grant Tracy Hudson a new trial and that sufficient evidence did exist for the conviction of Tracy Hudson at the first trial. Therefore, if sufficient evidence did exist for the conviction of Tracy Hudson at the first trial, the question of Burks vs. United States would not arise and therefore, this Application for Writ of Certiorari should be denied. Alternatively, the matter should be denied and referred to the lower courts for evidentiary hearing.

Respectfully submitted,

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In and for the Parishes of
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C E R T I F I C A T E

This is to certify that a true and correct copy of the foregoing Answer to the Application for Writs of Review to the United State Supreme Court has been served upon the following party by mailing such postage prepaid on this the 7th day of February, 1980. Richard Otto Burst, Sr., Attorney for Petitioner, Tracy Lee Hudson, Burst and Dewart, Attorneys Inc., 209 East Oklahoma, Post Office Box 578, Guthrie, Oklahoma 73044.

HENRY N. BROWN, JR.

(4)

Supreme Court, U. S.
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JUN 30 1980
MICHAEL RODAK, JR., CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1979

**No. 79-5688**

TRACY LEE HUDSON,

*Petitioner,*

vs.

THE STATE OF LOUISIANA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

## BRIEF OF PETITIONER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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**No. 79-5688**

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TRACY LEE HUDSON,

*Petitioner,*

VS.

THE STATE OF LOUISIANA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

---

## BRIEF OF PETITIONER

---

## OPINION BELOW

The opinion of the Supreme Court of Louisiana was rendered on June 25, 1979 (A. 39a); a dissenting opinion was filed on June 27, 1979 (A. 47a); application for rehearing was denied on September 4, 1979 (A. 53a); it is reported as *State v. Hudson, La.*, 373 So.2d 1294 (1979).

The opinion of the Supreme Court of Louisiana affirmed the ruling of the Twenty-Sixth Judicial District Court, Bossier Parish, Louisiana (A. 25a). The District Court therein denied petitioner's writ of habeas corpus on the issues herein presented.

## JURISDICTION

The opinion filed on June 25, 1979, which became final upon denial of rehearing on September 4, 1979, is presented for review. The petition for certiorari was filed within ninety (90) days of denial of rehearing in accordance with Rule 22(1) of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked because of allegation that the Supreme Court of Louisiana has decided a United States Constitutional question not before determined by this Court which was decided in a way not in accord with applicable decisions of this Court. Rule 19(1)(a) of the Rules of the Supreme Court of the United States. And which State Court decision denies petitioner his right and privilege against being twice placed in jeopardy for the same offense in violation of the Fifth Amendment. 28 U.S.C.A., Supp. 1970, §1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

United States Constitution, Amendment V:

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

LSA-C. Cr.P. art 778 (as appeared prior to amendment No. 527, in 1975):

"In a jury trial the court may direct a verdict of not guilty of one or more of the offenses charged, on its own motion or on that of a defendant, after the close of the state's evidence or of all the evidence, if the evidence is insufficient to sustain a conviction.

"In a trial by the judge alone the court shall enter a judgment of acquittal on one or more of the offenses charged, on its own motion or on that of a defendant, after the close of the state's evidence or of all the evidence, if the evidence is insufficient to sustain a conviction.

"If the court denies a defendant's motion for a directed verdict or judgment of acquittal at the close of the state's case, the defendant may offer his evidence in defense."

LSA-C. Cr.P. art 778 (as was in existence during all times pertinent to the case at bar):

"In a trial by the judge alone the court shall enter a judgment of acquittal on one or more of the offenses charged, on its own motion or on that of defendant, after the close of the state's evidence or all of the evidence, if the evidence is insufficient to sustain a conviction.

"If the court denies the defendant's motion for a judgment of acquittal at the close of the state's case, the defendant may offer its evidence in defense."

LSA-C. Cr.P. art 851 provides:

"The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied no matter upon what allegations it is grounded.

"The Court, on motion of the defendant, shall grant a new trial whenever:

"(1) The verdict is contrary to the law and the evidence, or

"(2) The court's ruling on a writ and motion, or an objection made during the proceedings, shows prejudicial error, or

"(3) New and material evidence that, notwithstanding exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial, it would probably have changed the verdict or judgment of guilty, or

"(4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that notwithstanding the reasonable diligence by the defendant was not discovered before the verdict or judgment, or

"(5) The court is of the opinion that the ends of justice would be better served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right."

## QUESTIONS PRESENTED

1. Whether or not the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's guilty verdict has been set aside and a new trial ordered solely for lack of sufficient evidence to sustain the jury's verdict.

2. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution applies to the State of Louisiana only if there is a finding of *no evidence* by the trial judge or if the double jeopardy clause of the Fifth Amendment applies to the State of Louisiana if there is a finding of *insufficient evidence* beyond a reasonable doubt.

## STATEMENT OF THE CASE

On January 4, 1977, Tracy Lee Hudson, hereinafter referred to as "petitioner", was charged with first degree murder in the District Court in and for the Twenty-Sixth Judicial District, Parish of Bossier, Louisiana, Criminal Docket No. 54,924; on March 2, 1977, petitioner was found guilty by a jury; on March 7, 1977, the Honorable Enos C. McClendon, sustained a motion for new trial on the sole ground that the evidence presented by the State was insufficient to sustain the verdict of guilty. Judge McClendon reasoned:

> "In the present case, I heard the same evidence the jury did, I am convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of homicide committed by the defendant of this particular victim." (A. 10a)

The Supreme Court of Louisiana upheld that decision. *State v. Hudson,* 344 So.2d 1 (1977).

Petitioner was retried and found guilty on September 20, 1977. At the retrial the State for the first time introduced an eyewitness who stated he had viewed the petitioner stabbing the victim; this eyewitness is the difference between insufficient evidence in the first trial and sufficient evidence in the second trial; there were no other eyewitnesses and this eyewitness's testimony is shrouded with discrepancies between his testimony and that of other State's witnesses. (A. 16a-18a) On June 19, 1978, the Supreme Court of Louisiana issued its opinioin affirming the second conviction (A. 12a) *State v. Hudson,* 361 So. 858 (1978). A rehearing was denied on August 31, 1978.

On October 2, 1978, based on *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), a writ of

habeas corpus was filed on behalf of petitioner (A. 19a); on November 13, 1978, writ was denied by the Honorable Cecil C. Lowe, Judge, Twentieth-Sixth Judicial District, Bossier Parish, Louisiana. (A. 25a)

Writ of Certiorari was accepted by the Supreme Court of Louisiana, oral argument held, and the writ was denied by order entered June 25, 1979 (A. 39a), one Justice dissenting (A. 47a); rehearing was denied by order filed September 4, 1979, with three of seven justices stating they would grant a rehearing. (A. 53a) From such denial of rehearing, petitioner timely requested this Court to accept Writ of Certiorari to the Supreme Court of the State of Louisiana, which was accepted by order on the 14th day of April, 1980.

## ARGUMENT

### UNDER LOUISIANA STATUTORY LAW AS IT EXISTED AT ALL TIMES PERTINENT HERETO, PETITIONER HAD ONE AND ONLY ONE MOTION AVAILABLE IN WHICH TO REACH THE ISSUE OF INSUFFICIENT EVIDENCE BEFORE THE TRIAL COURT—A MOTION FOR A NEW TRIAL.

It should first be noted that in *Burks,* by dicta, this Court indicated its view on the prior "waiver" rule wherein it was deemed that if a defendant filed a motion for new trial, he thereby waived any legal argument based on double jeopardy:

> "In our view, it makes no difference that a defendant has sought a new trial as one of his remedies or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." (2150)

Under Louisiana statutory law as it existed at all times pertinent hereto, petitioner had but one and only one legal vehicle in which to raise the issue of insufficient evidence, and that is by motion for new trial. There was no motion for acquittal, demurrer to the evidence, or motion for directed verdict available to petitioner under the statutory procedural scheme of the State of Louisiana.

In the Constitutional and Statutory Provisions cited, supra, petitioner has set out in full LSA-C. Cr.P. art 778 as it appeared prior to amendment No. 527, in 1975, and then again as art 778 subsequent to 1975 and at all times pertinent to the case at bar. This post 1975 statute is identical in all respects to the pre-1975 statute except that the first paragraph has been entirely omitted.

It is that first paragraph which was so omitted that prior to 1975 permitted the trial judge during a jury trial either at the close of the state's case or at the close of all evidence to sustain a demurrer or motion for directed verdict if in the view of the trial judge the evidence was insufficient to sustain a conviction.

It would indeed be an anomaly to permit a state to strike from its statutory scheme all alternate procedures for raising the issue of insufficient evidence except the legal vehicle of motion for new trial and then to hold that use of such motion was a waiver of the protection afforded by the Fifth Amendment double jeopardy clause.

## THE OPINION OF THE LOUISIANA SUPREME COURT HEREIN APPEALED FROM (A. 39a) IS AT THE OUTSET BASED ON TWO FAULTY PREMISES.

First, it is based on the premise that the trial judge in sustaining the motion for new trial merely found the evidence

to be insufficient; in the wording of the Louisiana Court, "... lack of sufficient evidence to sustain the jury's verdict." (A. 39a)

The trial court's oral reasons for sustaining the motion for new trial could not have been more precise and in contrast with the supposition of merely insufficient evidence had the defendant uttered the words himself. The trial court reasoned:

> "In the present case, I heard the same evidence the jury did, I'm convinced that there was *no evidence, certainly not evidence beyond a reasonable doubt,* to sustain the verdict of homicide committed by the defendant of this particular victim." (Emphasis added.) (A. 10a and 39a)

Indeed, the entire transcript of the trial judge's decision on the motion for new trial (A. 7a) yields only one inference, and that is that there was no evidence beyond a reasonable doubt before the jury of the essential elements of the crime charged. The trial court defined the issue himself based on the argument of counsel, as follows:

> "The argument was, however, that there was no evidence presented that would have justified the jury in finding the defendant guilty as charged because there was no evidence beyond a reasonable doubt before the jury of the essential elements to prove the essential elements of the crime." (A. 8a)

Hence, from the inception of the trial court's ruling in defining his issue through his legal reasoning and discussion of the case and through his final statement or holding, he discussed the sufficiency of the evidence, relying most often on the term "no evidence."

Second, the Louisiana Supreme Court's opinion is based on the premise that the *Burks* opinion applies to the instant case only if there is no evidence of the crime or no evidence of

an element of the crime charged, as opposed to insufficient evidence to prove the crime beyond a reasonable doubt.

This second faulty premise is one of the issues raised herein and if sustained, makes the first moot; that is, if indeed the *Burks* decision and the double jeopardy clause of the Fifth Amendment mandates the State of Louisiana to apply the standard of sufficient evidence to fairly support a conclusion that every element of the crime has been established beyond a reasonable doubt, then it makes no difference whether the trial court ruled on a no evidence standard or on a reasonable doubt/insufficient evidence standard, because either standard would mandate the release of petitioner herein.

## THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PRECLUDES A SECOND TRIAL AFTER A JURY'S VERDICT HAS BEEN SET ASIDE SOLELY FOR LACK OF SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S VERDICT.

This Court, in *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), stated:

> "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks,* 2147.

In the case at bar the essential testimony supplied in a second trial that was not present in the first was the testimony of an eyewitness who stated that he had told a policeman at the scene that he had observed the crime; but his name got lost somewhere (R. 215) for about ten months. There are unanswered questions concerning the delayed or sudden

appearance of this eyewitness which the petitioner must live with; moreover, such unanswered questions are not germane to the issues herein; what is germane, however, is that the State was afforded ". . . another opportunity to supply evidence which it failed to muster in the first proceeding". *Burks, supra,* 2147.

Chief Justice Burger set forth the issue in *Burks,* as follows:

> "We granted certiorari to resolve the question of whether an accused may be subjected to a second trial when conviction in a prior trial was reversed by an appellate court *solely for lack of sufficient evidence to sustain the jury's verdict.*" 2143

In the instant case, Justice Blanche of the Louisiana Supreme Court set forth the issue:

> "The issue presented is whether the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's guilty verdict has been set aside and a new trial ordered pursuant to LSA-C. Cr.P. art 851, *solely for lack of sufficient evidence to sustain the jury's verdict.* (A. 39a) (Emphasis added.)

The only difference is that in *Burks* the reversal was by appellate review and in the instant case the reversal was by motion for new trial pursuant to Louisiana Statutory Law. The Louisiana Court resolved this difference thusly:

> "While the case at bar involves the granting of a motion for new trial by the trial court for insufficient evidence rather than review at the appellate level, we deem the same principles are applicable to both." (A. 42a)

The Court then set out what they deemed the pertinent part of LSA-C. Cr.P. art 851, (A. 42a) which can be condensed further in pertinent part, to:

* * *

"The Court, on motion of the defendant, shall grant a new trial whenever

"(1) The verdict is contrary to . . . the evidence."

* * *

The Louisiana Court then cited case law supporting the proposition that under art. 851 the trial judge can grant a new trial if the evidence is insufficient to convict.

Hence, there is no issue presented by the Louisiana Supreme Court's opinion (A. 39a) on whether the insufficient evidence is found on appellate review or a motion for new trial.

There is, further, no difference between the standard of evidentiary review set out by Chief Justice Burger in *Burks* and by Justice Blanche in the case at bar on the questions set forth in the respective cases to be examined:

". . . solely for lack of sufficient evidence to sustain the jury's verdict." *Burks,* 2141 and *Hudson.* (A. 39a)

The difference, however, is that in *Burks,* Chief Justice Burger held that lack of sufficient evidence to sustain the jury's verdict in the first trial barred retrial; in the instant case, Justice Blanche held that lack of sufficient evidence to sustain the jury's verdict in the first trial did not bar retrial.

**THE REAL ISSUE THEN, WHICH IS HEREIN PRESENTED, IS: WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION APPLIES TO THE STATE OF LOUISIANA ONLY IF THERE IS A FINDING OF *NO EVIDENCE* BY THE TRIAL JUDGE OR IF THE DOUBLE JEOPARDY CLAUSE OF**

## THE FIFTH AMENDMENT APPLIES TO THE STATE OF LOUISIANA, WHERE THERE IS A FINDING OF *INSUFFICIENT EVIDENCE BEYOND A REASONABLE DOUBT.*

The Louisiana Supreme Court resolved this issue against petitioner. The Louisiana Court therein stated:

> "The question in the instant case is whether *Burks* compels the same result where the trial judge grants a motion for new trial on grounds of *insufficient evidence* as opposed to granting the motion on the grounds of *no evidence.* We believe it does not." (A. 43a)

However, in *In Re: Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), this Court stated:

> "Least there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (1073)

In *Jackson v. Virginia,* 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), this Court stated:

> "This is the first of our cases to expressly consider the question whether the due process standard recognized in *Winship* constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." (2786)

The petitioner in *Jackson* was seeking Federal Habeas Corpus review of his case based on a claim that he had been convicted in a state court upon insufficient evidence; the question presented was what standard to apply. This Court answered the question thusly:

> "We hold that in a challenge to a state criminal conviction brought under 28 U.S.C., §2254 . . . the applicant is entitled to a habeas corpus relief if it is found that upon the record evidence adduced at the trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt." (2792)

This Court, in *Jackson,* specifically rejected the "no evidence" rule of *Thompson v. Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960) as ". . . inadequate to protect against misapplications of the constitutional standards of reasonable doubt . . ." (2790)

The case at bar presents a stronger posture in that the trial court actually sustained a Motion for New Trial solely on the grounds of insufficient evidence.

The trial judge in his oral ruling stated: ". . . there was no evidence . . .", but then qualified that statement with ". . . certainly not evidence beyond a reasonable doubt, to sustain the verdict . . ." (A. 10a)

The only ambiguity in the trial court's ruling is whether he was basing his decision on the "no evidence" standard of *Thompson, supra,* or on the "insufficient evidence beyond a reasonable doubt" standard. An "ambiguity" without a distinctiion if petitioner's position is sustained herein; if this Court allows Louisiana to apply the "no evidence" standard on a motion for new trial, then the question of what standard the trial court applied must be determined; but if Louisiana must, as *Jackson* and *In Re: Winship* suggest, apply the "insufficient evidence beyond a reasonable doubt" standard, then petitioner must be acquitted.

As late as May 19, 1970, the Louisiana Supreme Court has indicated its hesitancy to follow the "reasonable doubt" standard of *Jackson*:

> "The Court has yet to fully embrace Jackson v. Virginia.[3]

* * *

Footnote 3:

"Although this Court in *State v. Matthews,* supra, [375 So.2d 1165] and *State v. Abercrombie,* 375 So.2d 1170 (La. 1979) suggested in dicta that it would follow *Jackson,* following those cases the Court has been less than explicit about which standard applies to this Court's review on direct appeal. It remains for future cases for this Court squarely to confront the question of whether it will follow *Jackson* or persist in the 'no evidence' standard of review". *State v. Custard,* S.Ct., Louisiana No. 66,295, _____ So.2d _____ (1980).

With due respect to the Supreme Court of Louisiana: Must they embrace the "reasonable doubt" standard of *Jackson,* or may they persist in the "no evidence" standard of review? Must they acquit on a finding of insufficient evidence beyond a reasonable doubt, as in *Burks,* or may they give the state a second chance to muster new evidence?

It is petitioner's contention that the same double jeopardy clause that applied to *Jackson* and to *Burks,* applies to Hudson.

The Fifth Amendment Double Jeopardy Clause is binding on the State of Louisiana. *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); jeopardy attached when the Louisiana jury was empaneled and sworn to try the instant case. *Crist v. Bretz,* 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); a finding of insufficient evidence to convict made by the Louisiana Supreme Court requires acquittal (even if defendant sought a motion for new trial—dicta). *Burks v. United States, supra;* the "reasonable doubt" standard of review must be embraced by the Louisiana Supreme Court. *Jackson v. Virginia, supra;* and the granting of a motion for new trial on the ground of insufficient evidence beyond a reasonable doubt to sustain

the jury's verdict by a Louisiana trial judge, bars retrial in the instant case.

## CONCLUSION

Petitioner filed a motion for new trial, which was sustained by the trial court on the sole basis of either no evidence of a necessary element being his criminal responsibility for the act alleged, or on the ground of insufficient evidence beyond a reasonable doubt, by which a jury could find that petitioner was the individual who had committed the act alleged. It is petitioner's contentioin that the standard of sufficient evidence beyond a reasonable doubt must be applied by any reviewing court, whether it be the trial court or an appellate court; that if such reasonable doubt standard is applied to the facts in the instant case, there need be no resolution or interpretation of the trial court's ruling as to whether it was based on the "no evidence" standard, because either would require acquittal of this petitioner if the latter standard is mandated upon the Supreme Court of Louisiana by the Fourteenth and Fifth Amendments to the United States Constitution and by prior decisions of this Court, namely, *In Re: Winship, Burks,* and *Jackson, supra.*

That for the foregoing reasons, Petitioner herein is entitled to an order directing a judgment of acquittal.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

TRACY LEE HUDSON,

*Petitioner,*

vs.

THE STATE OF LOUISIANA,

*Respondent*

ON WRIT OF CERTIORARI OF THE SUPREME COURT OF THE STATE OF LOUISIANA

## BRIEF OF RESPONDENT

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SUPREME COURT OF THE UNITED STATES

NO. 79-5688

TRACY LEE HUDSON,

Petitioner,

vs.

THE STATE OF LOUISIANA,

Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

# BRIEF OF RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 79-5688

TRACY LEE HUDSON,

Petitioner,

vs.

THE STATE OF LOUISIANA,

Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

# BRIEF OF RESPONDENT

## STATEMENT OF THE CASE

In addition to the fact set forth in Petitioner's "Statement of the Case", Respondent deems it relevant to outline the evidence adduced at the first trial held in March, 1977, as follows:

A. The victim, Wendell Gale Craig, a white male, was taken to the Elm Trailer Court by a fellow employee, who was black, in order that the victim could pick up his vehicle;

B. The defendant, Tracy Lee Hudson, lived in the trailer court directly across the street from the trailer visited by the black man outside his neighbors trailer and ordered the black man from the park, hitting the black man and slamming the car door on his leg. This was viewed by two teenage girls who were residents of the trailer park;

C. The victim came out of the trailer in which he was visiting and informed the

defendant that the defendant had caused him to lose his ride. An argument insued between the victim and the defendant. The victim was seen retreating and the defendant was seen advancing upon the victim with his hand near his hip pocket. This was observed by the two teenaged girls who left the area at that time to call the police;

D. A lady in the mobile home in which the victim was visiting observed the encounter between the defendant and the victim through the window of her trailer, turned to call her husband to the window and when she returned her gaze out the window, observed the victim bleeding from the chest. The victim then walked into her trailer and died;

E. The coroner's report showed that the victim died of a stab wound to the chest;

F. When the defendant immediately returned to his trailer, extinquished all

lights, which had previously been on, and when the police arrived, feigned a deep sleep. Both the defendant and his wife lied to the police, changing their stories several times, first maintaining that neither of them ever went outside the trailer and, by stages, finally admitting that both the defendant and his wife were outside the trailer and that the defendant was, in fact, in the street separating the defendant's trailer from the trailer visited by the victim;

G. None of the witnesses saw any other persons in the area and certainly no one with any opportunity or motive to stab the victim;

H. The defendant's wife testified that she went outside the trailer, but was not involved in the argument;

I. Only a matter of a few seconds elapsed in between the time that the defen-

dant was seen advancing upon the victim, until the victim was observed to have suffered a stab wound.

## ARGUMENT

The Trial Judge considered this evidence at the first trial insufficient to show guilt beyond a reasonable doubt, even though the jury found Tracy Hudson guilty. The Trial Judge granted a new trial under the provisions of L.S.A. Code of Criminal Procedure, Article 851, which is set out in Petitioner's brief. L.S.A. Code of Criminal Procedure, Article 857, provides that:

> "The effect of granting a new trial is to set aside the verdict or judgment and to permit retrial of the case with as little prejudice to either party as if it had never been tried." (Emphasis supplied)

Petitioner complains his retrial constitutes double jeopardy in violation of the

United States Constitution, Amendment V, and relies basically on Burks v. United States, and Jackson v. Virginia, both cited in his brief.

L.S.A. Code of Criminal Procedure, Article 591, provides that:

> "No person shall be twice put in jeopardy of life or liberty for the same offense, except, when on his own motion, a new trial has been granted or judgment has been arrested, or where there has been a mistrial legally ordered under the provisions of Article 775 or ordered with the expressed consent of the defendant."(Emphasis supplied)

To hold in the instant case that the Burks decision precludes a second trial of the defendant following the granting of his Motion for a New Trial would grant to the trial Judge, under the posture of the present law, power to substitute his opinion as to the guilt or innocence of an accused, and this power would be unbridled because no review could be had of that judge's decision.

In the instant case, it is clear from the record of the first trial, a synopsis of testimony being set forth above, that the trial judge erred in granting the defendant's motion for a new trial. However, no real review of this decision was possible under the posture of the law at this time.

The Louisiana Supreme Court, after reviewing this case on writs, considered Burks v. United States in rendering its opinion of June 25, 1979.

It should be noted that Justice Tate, in his concurring opinion, correctly stated the grounds for a new trial being granted herein, as that set out in La. C.Cr.P. 851 (5), when "the court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right."

As Justice Tate points out, the trial Judge had personal doubts as to the defendant's guilt, and he granted a new trial in the ends of justice. In effect, he second guessed the jury and required the State to try it again. The State had proven its case the first time, and the new trial was for the defendant's benefit, in "the ends of justice", rather than to give the State a second chance to attempt a conviction.

Obviously, there is evidence of the essential elements of the crime, and if the Jackson v. Virginia test is binding on the State of Louisiana, was there a finding by the trial Judge as a matter of law, that "There was a failure of proof at the trial level"? In this case, there was not a failure of proof, even as contemplated in the Jackson decision, that would warrant a finding of double jeopardy under the Burks rule,

if a new trial were ordered. The ruling of the Louisiana Supreme Court was therefore correct in permitting a retrial of Petitioner.

## CONCLUSION

At the first trial, Petitioner was found guilty, by a jury of twelve, of First Degree Murder. The trial Judge granted a new trial in the ends of justice, a ruling which is not reviewable by a higher court. The trial Judge did not grant an acquittal, nor did he contemplate anything other than a new trial for the benefit of Tracy Lee Hudson, because the State had presented sufficient evidence for the jury as to the essential elements of the crime. This does not give the State an opportunity to muster more evidence, but gives the defendant, who has been convicted, another chance before a jury of his peers. Therefore, the second trial of Petitioner did not constitute double jeopardy, and his conviction should stand.

Respectfully submitted,

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IN THE

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# BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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THE STATE OF LOUISIANA,

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# BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE AND CONSENT

The State Public Defender of California is an agency of California State Government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have substantial impact upon the rights of many persons being represented by this office, as well as upon the public as a whole, to be free from double jeopardy. An outcome in petitioner's favor will also tend to reduce judicial trial and appellate backlogs, and will thus work substantial

benefit for the administration of justice in general. Accordingly, the State Public Defender of California is filing this brief amicus curiae in support of the petitioner herein.

This brief is filed pursuant to Rule 42 of the Rules of this Court. Consent to the filing of the brief has been given by Mr. Richard O. Burst, Sr., Esquire, and by Mr Henry N. Brown, Jr., District Attorney for the 26th Judicial District of the State of Louisiana, counsel for petitioner and respondent, respectively. Letters reflecting such consent have been forwarded to the Clerk of this Court under separate cover, and should be on file in his office.

## *INTRODUCTION*

In the case before the Court, a jury verdict of guilty was set aside upon a finding by the trial court that "I'm convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict. . ." (*State* v. *Hudson* (1979) 373 So.2d 1294, 1295.)

After a second trial, at which the state offered the testimony of a new eyewitness who had not been produced at the first trial, petitioner was again found guilty. He contended that the second trial was barred by the Double Jeopardy Clause and by this Court's decision in *Burks* v. *United States* (1978) 437 U.S. 1. The Louisiana Supreme Court, however, held that because the first verdict was set aside upon a motion for a new trial, and due to its willingness to characterize the trial court's ruling as a finding of "insufficient" rather than nonexistant evidence, *Burks* did not apply.

*Amicus* files this brief because in California, as in Louisiana, a motion for a new trial is the sole vehicle for obtaining the trial judge's review of the evidence after a verdict has been returned; neither state has a post-verdict equivalent to Rule 29.[1] Amicus urges that an exception to *Burks* in this case is not justified. The fact that the ruling is issued by a trial court rather than an appellate court is irrelevant, and the fact that the ruling came in response to a motion for new trial rather than to a request for a judgment of acquittal can have no legal effect. To hold otherwise would merely thwart the purposes of the Double Jeopardy Clause and harm the cause of judicial economy by forcing cases such as this to proceed through time consuming and costly appeals.[2] Both goals are best served by a decision in the instant case which would favor the prompt and final termination of non-meritorious prosecutions.

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[1] Federal Rules Crim. Procedure, Rule 29 (18 U.S.C.A.).

[2] In 1977–78, out of 55,532 felony filings, there were 5,823 contested trials in California. 3,284, or 56% of these matters went on to appeal. Only 153 motions for new trial were granted by trial courts, which amounts to 2.6% of contested matters or three-tenths of one percent of all filings. (Data extrapolated from California Administrative Office of the Courts, *Annual Report* (1979) table X-A, p. 56; table XVII, p. 63; and table XX, p. 73.)

The number of motions for new trial granted was supplied to us by the Administrative Office of the Courts by means of a letter dated August 8, 1979.

I

## THE RULE OF *BURKS* V. *UNITED STATES* SHOULD BAR RETRIAL OF A CASE WHERE THE EVIDENCE SUPPORTING A VERDICT IS FOUND LEGALLY INSUFFICIENT BY THE TRIAL COURT

In *Burks* v. *United States* (1978) 437 U.S. 1, this Court held that the Double Jeopardy Clause bars a retrial where an appellate court has determined that the evidence introduced at trial is insufficient to sustain the verdict. The holding was based on this Court's observation that an appellate court, in reviewing the sufficiency of the evidence, applies the same standards as would a trial court in ruling on a motion for judgment of acquittal. (See Rule 29, Federal Rules of Criminal Procedure [18 USCA]):

> "The importance of a reversal on grounds of evidentiary insufficiency for purposes of inquiry under the Double Jeopardy Clause is underscored by the fact that a federal court's role in deciding whether a case should be considered by a jury is quite limited. Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal [citations omitted]. The prevailing rule has long been that a district judge is to submit the case to the jury if the evidence and inferences therefrom would warrant the jury's finding the defendant guilty beyond a reasonable doubt [citations omitted]. Obviously a federal appellate court applies no higher standard; rather, it must sustain the verdict if there is substantial evidence,

> viewed in the light most favorable to the Government, to uphold the jury's decision. . ." (437 U.S. at 17.)

Since a reviewing court in these circumstances does no more than hold that the defendant was entitled to an acquittal in the trial court in the first instance, the decision of the reviewing court should have the same effect, for purposes of the Double Jeopardy Clause, as an acquittal.

In *Greene* v. *Massey* (1978) 437 U.S. 19, decided the same day, this Court applied *Burks* to the states, following *Benton* v. *Maryland* (1969) 395 U.S. 784, and held that the State of Florida could not retry a defendant where that state's highest court had found "that the evidence was definitely lacking in establishing beyond a reasonable doubt" that the defendants were guilty of the crime charged. (437 U.S. at 20–21.)

This Court, it must be noted, did not analyze the standard of review which the Florida court was using, and perforce did not find that the Florida court was using the very limited standard of federal appellate review which the Court of Appeals had used in *Burks*. The *Greene* decision was based simply on the premise that the reversal was based on an appellate determination that the evidence was "insufficient." (437 U.S. at p. 24.)[3]

This case presents the issue whether *Burks* and the Double Jeopardy Clause apply to bar a retrial when a

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[3] Florida decisional law, however, seems clear that neither trial nor appellate courts are empowered to overturn jury verdicts which are supported by sufficient evidence because of mere personal disagreement. (See *State* v. *Bowle* (Fla. 1975) 318 So.2d 407.)

verdict is set aside for evidentiary insufficiency, when the order setting it aside is not characterized under state law as a judgment of acquittal, but when it is clear that the court which set aside the verdict was applying an "appellate" standard to scrutinize the sufficiency of evidence. *Amicus* submits that this case—particularly in light of the standard of appellate review just articulated in *Jackson* v. *Virginia* (1979) 433 U.S. 307—presents no basis in law or logic for carving out an exception to the *Burks* rule based on the fact that a finding of insufficiency was made by a trial court as opposed to an appellate court.

Certainly the fact that the court's order was characterized as an order for a new trial rather than as a judgment of acquittal does not in itself take the case outside the rule of *Burks* (see Argument I-A, *infra*). Nor can it be assumed that an order for a new trial is based on some standard of evidentiary review which is radically different from the appellate review which had occurred in *Burks* and *Greene*, as recently rearticulated in *Jackson*.

### A. As This Court Has Very Recently Articulated A Standard Of Appellate Review For Sufficiency Of The Evidence, It Is Not Clear Whether The States Have Adopted This Standard As The Criterion For Distinguishing Between A New Trial And A Judgment of Acquittal.

Last year, in *Jackson* v. *Virginia* (1979) 443 U.S. 307 [61 L.Ed.2d 560] this Court held that a criminal defendant on appeal is entitled to the reviewing court's scrutiny of *all the evidence* in the trial record, and to that court's determination as to whether record evidence could *rea-*

*sonably* support a finding of guilt (61 L.Ed.2d at 573). This Court rejected the view that "the beyond-a-reasonable-doubt standard is merely descriptive of the state of mind required of the factfinder in a criminal case, and not of the actual quantum and quality of proof necessary to support a criminal conviction" (*Ibid.*), and simultaneously rejected the "no evidence" rule of *Thompson* v. *Louisville,* 326 U.S. 199:

> "That the Thompson 'no evidence' rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent. '[A] mere modicum of evidence may satisfy a 'no evidence' standard . . . [citation] Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401—could be deemed a 'mere modicum'. But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt. The *Thompson* doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of *Winship* has been honored.' " (61 L.Ed.2d at 574.)

Although this Court held that its "reasonable jury" criterion was not "novel", but rather was consistent with the manner in which its earlier decision in *Glasser* v. *United States* (1941) 315 U.S. 60, 80, had been interpreted in the courts of appeal (61 L.Ed.2d at 573) it is by no means certain that this statement can be applied to the state courts as well. While there is indeed a long line of federal cases which have applied a "reasonable juror"

test in reviewing the sufficiency of the record evidence, it appears that a number of states have been applying a test much closer to that of *Thompson* than that of *Jackson* in deciding when a judgment of acquittal should be entered. (See for example, *State* v. *Jensen* (Idaho, 1972) 501 P.2d 727; *Medious* v. *State* (Miss. 1979) 375 So.2d 405; Oregon Const. Art. VII, § 3: ". . . no fact tried by a jury shall be otherwise reexamined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict".)

The case now before the Court presents a classic example of a pre-*Jackson* state legislative scheme under which a defendant is protected from a retrial only when the evidence (or lack thereof) at the first trial meets the *Thompson* standard of insufficiency. As the Court below said,

> "This Court has recognized that when it finds on review that in a prior trial there was *no evidence* of the crime charged or an essential element thereof, *Burks* precludes a retrial, and a verdict of acquittal must be entered . . . the question in the instant case is whether *Burks* compels the same result where the trial judge grants a motion for *insufficient evidence* as opposed to granting the motion on the ground of *no evidence* . . . we believe the holding in *Burks* (precluding a second trial) is limited to those cases where, *as a matter of law,* a reviewing court has determined that in a prior trial there was no evidence of the crime charged or an essential element thereof." (373 So.2d at 1297; emphasis in original.)

With the scope of constitutionally mandated appellate

review now considerably broader than that contemplated by *Thompson*[4] it is clear that many state courts which review trial evidence and find that it is "insufficient evidence" are exercising an appellate form of review—whether or not they believe this to be their mandate under state law. A California court, for example, in ruling on a new trial motion under the test set forth in *People* v. *Robarge*, (1953) 41 Cal.2d 628, 633; 262 P.2d 14, may once have been able to distinguish its function from that of an appellate court upon review—but the reason it would be able to make this distinction is that at the time *Robarge* was decided, the California standard of appellate review was essentially a *Thompson* standard. See e.g., *People* v. *Newland* (1940) 15 Cal.2d 678, 681; 104 P.2d 778: "The court on appeal will not attempt to determine the weight of the evidence . . . "

For example, in *Vietch* v. *Superior Court* (1979) 89 Cal.App.3d 722, 152 Cal.Rptr. 822, Cert. Den._____ U.S. _____, decided some months before *Jackson* v. *Virginia, supra*, a California appellate court held that *Burks* does not apply to a grant of a new trial for insufficient evidence. The basis for this holding was that the trial court was empowered to exercise *Jackson*-like power in re-

[4] Although, as noted above, the *Jackson* opinion rejected the idea that it was creating a "novel" criterion, this conclusion was based on federal rather than state appellate decisions. It is clear that the recent *Jackson* opinion *does* make a distinct leap from the *Thompson* standard which many states have retained. It holds that *Thompson* "is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt . . ." (61 L.Ed.2d at 574.) *Thompson*, in fact, did not even address a due process right of evidentiary sufficiency; *Jackson*, following *In re Winship* (1970) 397 U.S. 358, did (61 L.Ed.2d at 570.)

viewing *all* the evidence, whereas the appellate court could only determine if there was *any* evidence. (89 Cal.App.3d at 726.) Whatever validity such a distinction may have had prior to the announcement of *Jackson* v. *Virginia*, it is clear that given *Jackson*, the scope of review on a motion for new trial is identical to that on appeal. (*People* v. *Johnson* (1980) 26 Cal.3d 557,_____ Cal.Rptr._____: " . . . the court does not, however, limit its review to the evidence favorable to the respondent . . . [W]e must resolve the issue in light of the *whole record*."

**1. Although In Many States The Standard For Setting Aside A Verdict, Whether By Judgment Of Acquittal Or By An Order For A New Trial, Is Not Clearly Articulated, It Is Clear That Most States Do Not Allow Either Form Of Relief Unless The Evidence Is Insufficient Within The Meaning Of *Jackson* v. *Virginia***

As we shall elaborate, the overwhelming majority of American jurisdictions do not permit a trial judge to set aside a jury's verdict—with or without a new trial—unless, as here, that verdict is unsupported by substantial evidence. Should a case ever be presented to the Court where a trial judge has plainly overturned a verdict under state laws empowering him to act as a "thirteenth juror", it can be decided whether the *Burks* rule should apply to bar retrial. It likely will be some time before such a case appears, however, since few states empower their judges to act as thirteenth jurors, and since any overstepping of authority in a particular case can be constitutionally cured by an appeal seeking to reinstate the verdict. (*United States* v. *Wilson* (1975) 420 U.S. 332.)

It is true that a literal reading of many state statutes would, on first impression, suggest that these states have given their trial judges broad and sweeping powers to set aside a verdict and order a new trial where entry of judgment is "unfair" (Indiana Rules of Trial Procedure, T.R. 50) or "contrary to the weight of the evidence" (N.C. Gen. Stat. 15A-1414(b) (27)), or "not justified by the evidence" (Minnesota Rules Crim. Proc., Rule 26.04, subdv. 1). A statutory provision that a new trial may be granted "where the verdict is contrary to law or evidence" is found in many states (see for example, California Penal Code section 1181(6); Idaho Code Section 19-2406(6); Tex. Code Crim. Proc. Ann. Art. 40.03; Okla. St. Ann. section 952; Iowa Code Ann. section 813.2, rule 23; and Wash. Rev. Code Ann. section 10.67.010, which limits to two the number of new trials which may be granted on this basis.) The language of Federal Rule 33 has been adopted by a large group of states ("The Court on motion of a defendant may grant a new trial to him if required in the interest of justice." (F.R.Crim.P. rule 33; N.Dak.R.Crim.P. rule 33). And there are also a number of states whose new trial statutes do not fall clearly into any category (Ga. Code Ann. § 70-206: a new trial may be granted if the verdict is "decidedly and strongly against the weight of the evidence;" Illinois Ann. St. § 116-1: no standard specified; Connecticut G.S.A. § 54-95: no standard specified.).

It is also true that judicial construction of the new trial statutes, especially where this arises (as it frequently does) in the context of appellate deference to the trial

judge's discretion, sometimes purports to grant extremely broad powers indeed to the trial court to set aside a verdict "to best serve the interests of justice." (*Commonwealth* v. *Brown* (1960) 192 Pa.Super. 498, 162 A.2d 13.)

However, few states of which *amicus* is aware have, in actual practice, given their judges powers comparable to that of a federal judge in ruling on a Rule 33 motion. Federal construction of Rule 33 has allowed extremely broad latitude to trial judges in granting new trials, and in fact several federal decisions have explicitly adopted a "thirteenth juror" rule. (See *United States* v. *Narciso* (E.D. Mich. 1977) 446 F.Supp. 252, 303, and cases cited therein.) But by contrast, many state judicial interpretations of rules equivalent to Rule 33 have read the same language as allowing a much narrower scope of review to the trial judge. (See *People* v. *Emerson* (Colo. 1972) 500 P.2d 368.)

Other states as well have clearly declined to give trial judges the power of a "thirteenth juror" in deciding whether to order a new trial. The Florida Supreme Court, for example, in construing its new trial rule (Fla. Stat. Ann. R.Crim.P. Rule 3.580) has held, in reversing a new trial order, that "The record reflects that the order was predicated primarily upon the trial court's own view of the evidence, in particular, lack of proof of intent . . . A trial judge is not permitted to sit as a seventh juror with veto power pitting his judgment against that of the jury. . ." (*State* v. *Bowle* (1975) 318 So.2d 407.) Washington so provides by statute, Wash. Rev. Code

Ann. 10.67.010; *State* v. *Collins* (1967) 435 P.2d 538. California has done so by construction in *People* v. *Robarge, supra,* at 633.

Under the laws of some other states, the difference between the standard of review for entering a judgment of acquittal and for granting a new trial is articulated poorly, if at all. As a result, new trial orders can be issued in such jurisdictions to remedy a multitude of sins at the first trial—including all degrees of evidentiary insufficiency, from the judge's personal disbelief of a prosecution witness [5] up to complete failure of proof by the prosecution.[6] In these states, therefore, the fact that a new trial is ordered because there was insufficient evidence gives no clue as to *how* insufficient the evidence was unless, as here, there is an elaboration of reasons entered into the record by the court.

More significantly, where the distinction between the two standards has been articulated,[7] many states have,

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[5] See, for example, *People* v. *Ramos* (1970) 33 A.D.2d 344, 308 N.Y.S.2d 195, construing N.Y. Crim. Pro. Law § 330.30.

[6] Missouri, for example, appears not to distinguish the standard of evidentiary insufficiency required for a new trial from that required for a judgment of acquittal. See Mo. Ann. Stat. (Vernon) § 547.020, *State* v. *Russell* (Mo., 1959) 324 S.W.2d 727; *State* v. *Carroll* (Mo. 1933) 62 S.W.2d 863, 867. Illinois also has failed to develop a distinction, see *People* v. *Smith* (Ill. App. 1977) 359 N.E.2d 228.

[7] Most of the federal-rules states, and some others as well, have drawn a distinction between the standard for a judgment of acquittal and the standard for ordering a new trial; some have even acknowledged that the Double Jeopardy Clause compels them to do so. See, for example, Vermont R.Cr.P. Rule 33; Pa.R. Crim.P. Rule 1123, and *Commonwealth* v. *Meadows* (1977) 471 Pa.201, 369 A.2d 1266; Michigan M.C.L. § 770.1; M.S.A. § 28.1098; *People* v. *Hampton* (Mich. 1979) 285 N.W.2d 284.

For an example of a case which addresses the Double Jeopardy question but fails to hold squarely that *Burks* and *Jackson* bar a retrial whenever the whole record at the first trial is insufficient to see *People* v. *Hampton* (Mich. 1979) 285 N.W.2d 284, cert. pending, No. 79-1446.)

as here, failed to require that a judgment of acquittal rather than a new trial be ordered when the evidence fails to meet the test of legal sufficiency.

In the wake of *Burks,* one state court has correctly determined that a claim that the evidence is legally insufficient *must* be reached if it is argued in a post-trial motion or on appeal (*People* v. *Taylor* (Ill. 1979) 391 N.E.2d 366), and it has also been held that the decision as to legal sufficiency determines whether a judgment of acquittal or a new trial should be ordered (*State* v. *McMorrow* (N.D. 1979) 286 N.W.2d 284, overruling *State* v. *Holy Bull* (N.D. 1975) 238 N.W.2d 52.) However, in the vast majority of states it is by no means clear that a judgment of acquittal and *not* a new trial, must be ordered by the trial court whenever the evidence at the first trial fails to meet the test of sufficiency set out in *Jackson* v. *Virginia, supra* at 307.[8]

Whatever the constitutional ramifications of a new trial granted on "thirteenth juror" grounds, it suffices that the trial judge in the present case was clearly exercising an appellate type of review when he stated that: "I'm convinced there was *no evidence,* certainly not evidence beyond a reasonable doubt, to sustain the verdict. . ." (373 So.2d at 1295 [emphasis added].) And in most other states as well, trial judges are exercising an "appellate" function rather than a "thirteenth-juror"

[8] North Carolina, for example, has a "Motion for Appropriate Relief" which may be made for varying degrees of evidentiary insufficiency. (N.C.G.S. 15A-1414.) Minnesota requires that a motion for judgment of acquittal be joined with a new trial motion. (27A Minn. Stat. Ann., R.Crim.Proc. Rule 26.04, subd. 3.)

function when they set aside a verdict for insufficient evidence and order a new trial. Certainly in California the "thirteenth-juror" definition of a trial judge's function has been decisively rejected. (*People* v. *Robarge, supra,* at 628.) The California Supreme Court observed in *Robarge* that:

> "While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed. . . This does not mean, however, that the court should decide what result it would have reached if the case had been tried without a jury. . ." (41 Cal.2d at 633.)[9]

Thus, in this case, and in the vast majority of similar cases which are likely to arise, the order for a new trial is based on a review of the evidence which is comparable to the appellate function, rather than an invasion of the jury's function.

**2. The Policy And Reasoning Of *Burks* Clearly Extend To A New Trial Order Based On The Insufficiency Of The Evidence**

The history of law and policy which underlie the *Burks* decision dictate that *Burks* should apply to new-trial orders such as Louisiana's and California's. Although the holding of *Burks* was a narrow one—that the Double Jeopardy Clause bars a retrial where the evidence at the first trial was insufficient under the standard of federal appellate review—the reasoning on which it was based applies with full force in the present case.

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[9] *Robarge* is regarded as providing the controlling definition of a trial judge's powers on motion for new trial. (See *People* v. *Montgomery* (1976) 61 Cal.App.3d 718, 730, 132 Cal.Rptr. 558.)

*Burks* rested on a rejection of the "waiver" theory as the constitutional justification for retrials after appellate reversals. (437 U.S. 10, 17.) It acknowledged frankly that the decision as to whether a defendant may be retried after a successful appeal or post-trial motion is made by weighing competing considerations, and not by presuming that the Double Jeopardy protection has been waived by the appeal or motion.

These competing considerations are, of course, the defendant's constitutionally based interest in being free from repeated prosecutions, and society's interest in convicting the guilty when it has produced sufficient evidence of guilt.[10] Where the reversal is based on evidentiary insufficiency, the considerations in favor of allowing the prosecution a retrial vanish; the state has had a chance, in a presumably error-free trial, to prove its case and it has failed. As an accused is not being set free due to errors which have no bearing on the issue of his guilt, the "error" of evidentiary insufficiency goes straight to the ultimate issue. (*See* Double Jeopardy: A New Trial After Appellate Reversal For Insufficient Evidence, 31 U.Chi.L.Rev. 365, 370 (1964).)

The well-known considerations *against* compelling the defendant to undergo a second trial, by contrast, are as strong or stronger when the reversal is for evidentiary insufficiency. Under these circumstances, the danger of harassment from repeated efforts to convict does become a real threat; it has long been acknowledged that ". . . the state with all its resources and power

[10] "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." (*United States* v. *Tateo* (1964) 377 U.S. 463, 466.)

should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." (*Green* v. *United States* (1957) 355 U.S. 184, 187–188.)

More important, the chances of a conviction are greatly enhanced on retrial, both through a simple increase in mathematical probability and also because the prosecution can always do a better job the second time around, particularly after it has been put on notice of the deficiencies of its first presentation. Such is precisely what occurred here, when the state pulled a new witness out of its hat at petitioner's second trial.

> "For instance, if the evidence were such that one in four juries would convict and three in four acquit, the probability of conviction if the defendant is tried once is, of course, one in four (4/16). If two trials were permitted the defendant would have to convince two juries of his innocence and the probability of one of the two convicting would be 1—(3/4 x 3/4) = (7/16); assuming the independence of each jury and the absence of other variables. If he had to convince five juries his probability of conviction by one would rise over three in four." Note, Twice in Jeopardy, 75 Yale L.J. 262, N. 74 at 278 (1965).[11]

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[11] See, for example, *Ashe* v. *Swenson* (1970) 397 U.S. 436, 477: "In this case the state in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution. . . But this is precisely what the constitutional guarantee forbids."

The California Supreme Court also has found, in its most recent decision on the scope of the double jeopardy clause that "[w]ithout the guarantee against double jeopardy, the chances of convicting innocent persons would be increased, both because the state would have unlimited opportunities to prosecute an acquitted defendant and because the exposure of the accused's defense in the first trial would provide the state with a major advantage in preparing for the second. (*See generally,* Schulhofer, Jeopardy and Mistrials (1977) 125 U.Pa.L. Rev. 449, 508–511" (*Larios* v. *Superior Court* (1979) 24 Cal.3d 324, 329, 155 Cal.Rpt. 374.)

Since the major effect of allowing repeated trials after a finding of evidentiary insufficiency at the first is to increase the chances of convicting the innocent, clearly no social interest in convicting the guilty is present here to offset the harassment, anxiety, and increasing risk of injustice to the defendant.

This balance of the defendant's interests and society's is not changed when the reversal of the first conviction is for insufficient evidence instead of for no evidence. In either case, the state has failed to meet the burdens imposed upon it by law to prove the defendant's guilt beyond a reasonable doubt. In both cases, the state is, in effect, given a free dress rehearsal of its case, a chance to patch up any weaknesses or contradictions in its own evidence and even—as in the present case—a chance to produce entirely new witnesses, with no explanation as to why they were not produced at the first trial, after it has heard and evaluated the defense case.[12]

### B. That The Defendant And Trial Court Contemplated A New Trial Is Not Conclusive On The Issue Of Double Jeopardy

This Court has recognized that, in enforcing the constitutional bar against double jeopardy, it must look beyond the form to the substance of the order which terminates the initial trial or sets aside the initial verdict (*United States* v. *Martin Linen Supply Co.* (1977) 430 U.S. 564, 571.) Nor may enforcement of the constitutional right depend on the trial judge's intention in setting aside a verdict: "The fact that the trial judge contemplates that there will be a new trial is not conclusive on the issue of double jeopardy." (*United States* v. *Scott* (1978) 437 U.S. 82, 92.) Thus, cases which have held that

[12] See *Larios* v. *Superior Court, supra,* fn. [11], *ante.*

a new trial is constitutionally permitted simply on the grounds that the defendant asked for this remedy, rather than for a judgment of acquittal or for a directed verdict (e.g., *United States* v. *Parks* (5th Cir., 1972) 460 F.2d 736, 745; *State* v. *Holy Bull* (N.Dak. 1975) 238 N.W.2d 52, 54–55) can no longer be followed in light of *Burks:*

> "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." (437 U.S. 1, 17.)

Particularly where a new trial motion is the only means available to a defendant to obtain review of the sufficiency of the evidence, it is manifestly unfair to construe his request for a new trial as a waiver of his right not to be placed twice in jeopardy. Petitioner in his brief has shown that under Louisiana law, a motion for a new trial is the first and only legal vehicle provided a defendant to raise the issue of insufficient evidence before the trial court; thus the fact that the court *grants* a new trial motion obviously cannot be construed to mean that it has *rejected* a defendant's claim that the record evidence does not meet the standard of legal sufficiency.[13]

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[13] The Louisiana Supreme Court itself acknowledged that the question whether double jeopardy bars a retrial must be decided by looking at what standard of evidentiary review the judge applied, and *not* by looking at his characterization of the order: ". . . The contention that there was no evidence of the crime charged or an essential element thereof may properly be raised solely by a motion for new trial [citation omitted.] Thus if a trial judge granted a motion for new trial on the gounds of no evidence of the crime charged or an essential element thereof, *Burks, supra*, and our holding in *Thompson* [366 So. 2d 1291 (La., 1978)] would require the trial judge to enter a verdict of acquittal." (373 So. 2d 1297.)

*Amicus* points out that under California law, a similar problem arises: although California does allow for a ruling which is characterized as a "judgment of acquittal" if the trial evidence fails to meet the standard of legal sufficiency,[14] this ruling can only be entered *before* the case is submitted to the jury for a decision.[15] Once a jury verdict is returned, a trial judge can only act under Penal Code section 1181—the new trial statute.[16]

Thus, a cautious judge who chooses to wait until the jury verdict is in before ruling on the legal sufficiency of the evidence would find himself barred from giving the defendant the relief to which he is entitled under the double jeopardy clause.[17]

It is hard indeed to conceive of a case in which a failure of proof would not have been apparent to the court in time to grant a final judgment of acquittal prior to submission of the case to the jury. But under both California's and Louisiana's statutory schemes, a criminal defendant legally entitled to an acquittal will lose substantial rights simply because the trial judge—who never should have allowed the case to be submitted to

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[14] California Penal Code section 1118.1.

[15] California Penal Code section 1118.2.

[16] Penal Code section 1181 (6) authorizes the granting of a new trial "where the verdict of finding is contrary to law or evidence."

[17] By contrast the federal courts and most states which have adopted the Federal Rules of Criminal Procedure retain the power to acquit following the submission of a case to a jury. (F.R.C.P. Rule 29(b) (18 U.S.C.A.; see also, for example, Vermont, V.R.Cr.P. 29; South Dakota, S.D. Compiled Laws Ann. 23A-29-2; Ohio Crim.R.29(B); Colorado R.Crim.P. rule 29(b). Some, on the other hand, do not authorize this motion after the jury has returned, (see North Dakota, N.D.R. Crim.P., rule 29.)

a jury in the first instance—either chooses to procrastinate or is prevented from acting by state law.

## CONCLUSION

The instant case presents no basis, in law or reason, for creating an exception to *Burks* when the state sets aside a verdict by granting a new trial motion rather than a judgment of acquittal. In Louisana, in California, and in fact in the great majority of the states a trial judge in so acting is exercising an appellate standard review of the sufficiency of the evidence, regardless of the name which is given to his order.

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